QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From January 1, 1941
Through March 31, 1941
Volume XXII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1941 through March 31, 1941.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent to each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,

Attorney General.

WETUMPKA PRINTING CO.
Printers and Publishers
Wetumpka, Ala.
1941

OPINIONS

January 7, 1941.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Licenses—Real estate broker or salesman—Alabama Real Estate Commission—

1. License as provided by Schedule 118 of Section 348 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256, 488), required in addition to qualification license for real estate brokers and salesmen as provided for by Act No. 344, H. 377, approved August 27, 1927, as amended (General Acts, 1927, page 336).

2. License granted by Alabama Real Estate Commission held not a revenue license.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of December 16, 1940, is as follows

"Mr. H. H. Cory, of Prattville, Alabama is a real estate agent in this county and has been cited by the license inspector to take out license as real estate agent, he said he paid the Real Estate Commission at Montgomery the sum of $15.00 the first of October 1940, and he understood that the said sum paid for all he had to have in the way of a license to sell real estate. The question is should he secure a license according to Schedule 118 page 275 of Simon's Revenue Code for 1936, which licensed for a city the size of Prattville, is $5.00 for the State and as we understand it $2.50 for the County making the total cost of the license $8.00."

In reply, I wish to advise that in my opinion the real estate agent named in your request is required to pay $5.00 to the State and $2.50 to the county for license to do a real estate business as provided for by Schedule 118 of Section 348 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256, 488).

You state that a license has been secured by the real estate agent under consideration from the Alabama Real Estate Commission at Montgomery. You further state that the contention of the said licensee is that he should not pay any further license to engage in the real estate business in Alabama. In my opinion, the license issued by the Alabama Real Estate Commission at Montgomery is not a revenue license, but is imposed under the police power of the State under authority of Act No. 344, H. 377, approved August 27, 1927 (General Acts, 1927, page 335), as amended. The license issued by

the Alabama Real Estate Commission has been held by our Supreme Court, in the case of **Knight v. Watson,** 221 Ala. 69, 127 So. 841, to be a regulatory measure "under the police power, designed to regulate the business, to protect the public against fraud and imposition, requiring a license as evidence of qualification and fitness, * * *" of any person desiring to engage in the real estate business in Alabama. This particular license was not intended as a tax imposed upon the privilege of engaging in business as a real estate broker or real estate salesman. In fact, at the time this particular regulatory license was authorized by the Legislature a revenue license was already required for engaging in such business. See **Knight v. Watson,** supra.

I wish here to refer you to Schedule 118 of the Revenue Law, cited supra, which provides as follows:

> "Schedule 118. Each person, engaged in buying, selling, or renting real estate on commission, when such real estate is situated in this State shall pay to the State the following license tax: In cities and towns of ten thousand inhabitants and over, Fifteen Dollars; in cities and towns of less than ten thousand and more than five thousand inhabitants, Ten Dollars ($10.00); in all other places, Five Dollars ($5.00)."

I wish further to refer you to Section 350 of the Revenue Law of 1935, cited supra, which provides, in part, as follows:

> "(b) There is also hereby levied for the use of each county in the State a license, or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

You will note that under the above quoted provisions of law and in accordance with your statement of facts, a license of $5.00 to the State and $2.50 to the county must be paid by one wishing to engage in the real estate business in Prattville, regardless of the payment of the license required for qualification as a read estate broker or a real estate salesman, with the Alabama Real Estate Commission.

Cf. Quarterly Report Attorney General, Volume XIV, page 9.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 7, 1941.

Hon. T. R. Snead,
Judge of Probate,
Cherokee County,
Centre, Alabama.

Constitutional Amendment—Costs of Governor's proclamation—

1. Costs of Governor's proclamation in regard to the Constitutional Amendment proposed by General Acts, 1939, page 1034, should be paid for by the County, as provided for by Section 233 of the Code of Alabama, 1923.

2. Matters essentially statutory, appended to a proposed Constitutional Amendment, not approved by the Governor and not voted upon by the electorate; do not have the force and effect of law.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of December 2, 1940, is as follows:

"I have received a bill from the State requesting that I pay the State the sum of $752.07, that being one-half of the claim for publication of the Governor's Proclamation No. 3, submitting proposed amendment to the Constitution as per Act No. 660 of the 1939 Legislature. This Act provided that the expense of the publication was to be paid by State funds.

"This Act applied to Cherokee County and Etowah County and was not a local Act in that it did not apply to Cherokee County alone.

"I will thank you to advise me if Cherokee County is liable for the payment of this bill, or if the same should be paid by the State.

"In our budget for the year 1940-1941, no provision was made for the payment of this bill and, therefore, we have no monies with which to pay the same if it is a charge against the County."

It is my opinion that Cherokee County is liable for the payment of the aforementioned bill.

While your statement that the Act in question is not a Local Act because it did not apply to Cherokee County alone is incorrect in view of Section 110 of the 1901 Constitution, which provides that "a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole," it is not here material.

This office has heretofore held in an opinion to the Hon. Fleetwood Rice, Judge of Probate, Tuscaloosa County, under date of March 9, 1936 (Quarterly Report of Attorney General, Vol. II, page 284), that where a Constitutional amendment affects two counties individually, the costs of publishing the Governor's proclamation should, in view of Section 233 of the Code of Alabama, 1923, be borne equally by the two counties.

Section 233 of the 1923 Code of Alabama provides as follows:

"233. **Payment for publication of governor's proclamation submitting proposed amendment to constitution, affecting county or subdivision thereof.** Whenever an amendment to the constitution of Alabama, affecting only a county or a subdivision of a county or a municipality, is submitted to the people for ratification or adoption, the county to which such amendment relates, or affects, or the municipality which such amendment affects, shall pay the expense of the publication of the governor's proclamation concerning such amendment, and the court of county commissioners or board of revenue of the county where such amendment relates to a county or a part thereof, and the auditor, clerk, mayor, or other officer having authority to draw warrants on the treasury of such municipality, when such amendment relates to a municipality, shall, upon the presentation of a claim for the necessary amount to be paid, by the state for such publication, certified by the state auditor, make an order and draw a warrant payable to the state treasurer out of the funds of the said county or municipality as the case may be, and the custodian of the county funds or municipal funds, as the case may be, shall pay the amount of said warrant to the treasurer of the State of Alabama."

This section was held constitutional in **State v. Mobile County,** 239 Ala. 502, 195 So. 878.

Sections 4 and 5 of Act No. 660, H. 666, passed by House of Representatives July 2, 1940, and passed by Senate July 2, 1940, (General Acts, 1939, page 1034), which proposed the Constitutional Amendment in question, provide that the expenses of the election shall be paid by the State. It will be noted, however, that Sections 4 and 5 of Act No. 660, supra, were not printed upon the ballot which was submitted to the electorate in the election at which the proposed Constitutional Amendment was voted upon. In other words, Sections 4 and 5 are not part of the proposed Constitutional Amendment, but are matters essentially legislative or statutory which are appended to the proposed Constitutional Amendment.

So, the question which presents itself for determination is whether such a provision attached to a proposed constitutional amendment and embodied in the act proposing it has the force and effect of a statute passed by the Legislature under its law-making authority. If it does, then it, being the last expression of the Legislature, would supersede Section 233 of the 1923 Code insofar as this particular Constitutional Amendment is concerned. **Fidelity & Deposit Company of Maryland v. Farmer's Hardware Company,** 223 Ala. 447, 136 So. 824. If, however, it does not have the force and effect of law, it would be a mere declaration of the Legislature of no force and effect,

and Section 233 of the Code would apply in the instant situation, placing the liability for the costs of the Governor's proclamation on the county or counties affected.

Our Courts have pointed out that the authority of the Legislature to propose Constitutional amendments is separate and apart from its power to make laws. **Johnson v. Craft,** 205 Ala. 386, 87 So. 375; **Jones v. McDade,** 200 Ala. 230, 75 So. 988, and that amendments to the Constitution may be proposed by act or resolution of the Legislature, which act or resolution is not subject to the Constitutional restrictions applicable to the passage of laws by the Legislature under its law-making authority, but is governed entirely by Sections 284 through 287, inclusive, of the Constitution. **In Re: Opinion of the Justices; In Re: Warrant Amendment,** 227 Ala. 296, 149 So. 781.

The general rule which is apparently followed by our Courts in the above styled cases is concisely stated in 11 Am. Juris. 633, Constitutional Law, Section 28, as follows:

> "In submitting propositions for the amendment of the Constitution, the legislature is not exercising its legislative power or any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power which is conferred upon it by the people and which might with equal propriety have been conferred upon either house, the governor, a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given and is measured by the terms in which it has been conferred; and it cannot be extended by the legislature to any other object or enlarged beyond these terms."

If the Constitutional Amendment in question had been proposed by resolution, as it may have been (Section 287 of the Constitution; Johnson v. Craft, supra), there would have been no doubt but that the appended provisions which were not submitted to the people would not have the force and effect of law. **Reynolds v. Blue,** 47 Ala. 711; **Johnson v. Craft,** supra.

In the instant, case provisions were embodied in an act of the Legislature which, though sufficient under our Constitution to propose a Constitutional amendment, did not sufficiently comply with the various Constitutional requirements of an act which is passed by the Legislature under its law-making authority to give it the force and effect of law. For instance, an Act of the Legislature to become a law must be presented to the Governor and either approved by him or become a law by one of the other methods provided for in Section 125 of the Constitution. Otherwise, the act does not become a law. In the instant case, the act in question was not presented to the Governor, which, in my opinion, would of itself prevent those provisions of it not voted upon by the electorate from becoming a law of this State.

In **Jones v. McDade,** supra, Mr. Justice McClellan ably discusses the distinction between the Legislature's law-making authority and its authority to propose Constitutional amendments. In that case Mr. Justice McClellan said:

"Article 18, consisting of sections 284-287, inclusive, provides a complete system for either amending the organic law through the submission by the Legislature of an amendment or amendments to the electorate of the state, or the submission by the Legislature to the electorate of a proposition to constitute and convene a body to alter the Constitution. The report of this appeal will contain the sections mentioned, except 285, which is quoted in the opinion. The process provided by these sections is not legislation, is not law-making in the sense that laws are proposed and are considered and enacted, under the Constitution of this state. One of the distinguishing features of the two systems and processes is that to the executive is committed functions and powers with respect to the enactment of statutes (Const. Secs. 45, 61, 62, 63, 64, and 125); while with respect to the submission to the electorate of propositions for the amendment of the organic law or for the convention of a body to alter or amend the Constitution through 'act or resolution' section 287 provides that neither the 'act or resolution' so evincing the judgment of the Senate and House in the premises 'shall be submitted for the approval of the Governor, but shall be valid without his approval.' Another distinguishing feature is present in the fact that a statute becomes a law when its enactment has been accomplished according to the forms prescribed by the Constitution; whereas the service performed by the legislative houses in respect of changes in the Constitution is that of a proposer of a proposition for the consideration and judgment of the electors at the ballot box; and such a proposition is wholly ineffectual unless the requisite majority of the electorate affirmatively approve the proposition so submitted. The proposal and submission of an amendment or of amendments to the Constitution may be made by resolution, instead of by an act; the choice of one of these means by the houses for submitting an amendment to the judgment of the electorate being given the houses by section 287 of the Constitution. A comparison of the methods prescribed by the Constitution for enacting laws with those prescribed for the valid submission by the houses of amendments to the Constitution discloses many differences essential for the valid enactment of laws, and not at all prescribed by the Constitution when the object of the houses is to submit an amendment to the Constitution to the judgment of the electorate. It is not necessary to enter upon an enumeration of all these differences, since they are readily discoverable upon a comparative reading of the two distinct systems. **One contemplates the enactment of laws of a permanent nature; while the other contemplates the mere submission of propositions for electoral consideration and action, upon the affirmative response to which by the requisite majority of the electorate the proposal submitted by the houses becomes a part of the Constitution of the state, not an element of the statutory law of the state.**" (Emphasis supplied.)

In the case of **Clements v. Hall,** 23 Ariz. 2, 201 P. 87, wherein a similar situation was before the Court, it was said:

"We think the courts all concur in holding, where the question has arisen, that the two branches of the Legislature, in proposing amendments to the Constitution, under provisions like ours, are exercising delegated powers, and acting as agents in a sense and are not functioning in a

legislative capacity. The text on the question in 6 R. C. L. 28, Sec. 19, is as follows:

" 'The power of the Legislature to initiate changes in the existing organic law is a delegated power and one which is generally to be strictly construed under the limitations by which it has been conferred. In submitting propositions for the amendment of the Constitution, the Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the Governor, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and it cannot be extended by the Legislature to any other object, or enlarged beyond these terms.'

* * * * * * *

"If there be appended to a proposed amendment by the Legislature any measures essentially legislative or statutory in character, it must be submitted to the Governor for his approval before it can become a law. Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; Nesbit v. people, 19 Colo. 441, 36 Pac. 221." (Emphasis supplied.)

See, also, 16 C.J.S. 40, **McBee v. Brady,** 100 P. 97, 106; **Warfield v. Vandiver,** 101 Md. 78, 60 A. 538.

Therefore, the premises considered, it is my opinion that the provisions contained in Sections 4 and 5 of Act No. 606, supra, concerning the expenses of the election are matters of a legislative or statutory nature, which should have been passed by the Legislature under its law-making authority and subject to the various Constitutional limitations which apply to the passage of a statute, and that the inclusion of these matters in a proposed Constitutional amendment amounts to a mere declaration of the Legislature which is of no force and effect. Therefore, you are advised that Section 233 of the Code prevails in this case, and that Cherokee County is liable for its share of the costs of the Governor's proclamation in regard to Act No. 660, supra.

The fact that this expense was not included within the county budget cannot affect the legality of the claim. Biennial Report of Attorney General, 1922-24, page 185. The budget may be amended to care for this claim. Biennial Report of Attorney General, 1936-38, page 42. I also wish to refer you to an opinion found in Biennial Report of Attorney General, 1936-38, page 537, which deals with the method of paying claims in order of their priority.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 7, 1941.

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Taxation—Partial Redemption—

One who has a right to redeem from a tax sale seeking redemption of certain real property, which is included in one assessment with other real property and personal property, is required to pay his proportionate share of the personal property tax so assessed, together with other legal charges. (Sections 271 and 272 of Revenue Act of 1935).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 31, 1940, in which you request my opinion as follows:

"When several distinct lots of lands have been included in one assessment and sold for taxes under one decree to the State, and a person (not the owner making the assessment) having an interest in one lot desires to redeem the lot he has an interest in, offers to pay the tax assessed against his particular lot, with interest and his proportion of the costs, as provided in Section 271, Page 370, Acts 1935, does he have to pay an additional sum on account of the fact that personal property happened to be included in the entire assessment?

"In other words, under such conditions, if the lot desired to be redeemed was valued in the assessment at $500.00 and there was an assessment of personal property amounting to $3,000.00, would the person desiring to redeem the lot in which he had an interest be required to pay any part of the tax on the personal property assessed? To my mind, this is not indicated by the wording of the statute. Furthermore, to require the redemptioner to pay any part of the tax on the personal property, might preclude a redemption by him entirely. For instance, it might be that several pieces of real property were assessed, valued at not more than $100.00 for each lot, in the same assessment there being a personal property assessment of $5,000.00, which is not unusual. One desiring to redeem one of the lots in which he had an interest, would be required to pay more than the value of his lot, if he had to pay on the personal property. This, of course, would preclude a redemption."

In answer to your inquiry, it is my opinion that the party in question seeking a redemption of certain real property, which is included in one assessment with other real property and personal property, is required to pay his proportionate share of the personal property tax so assessed, together with other legal charges.

An opinion of this office found in Quarterly Report of Attorney General, Volume XIX, page 245, held that a mortgagee seeking to redeem real estate covered by his mortgage from sale to State for taxes assessed against said real estate, must deposit with the probate judge the amount of money for which the real estate was sold, including taxes assessed against the mortgagor on his personal property **where real estate was the only real estate assessed against the mortgagor.** It will be noted that this opinion dealt with a situation where the real estate sought to be redeemed was the only real estate assessed against the mortgagor.

However, in an opinion of this office found in Quarterly Report of Attorney General, Volume V, page 126, a situation analogous to the one presented in the instant inquiry was considered. In said opinion it was held that in case a partial redemption of real property was desired by one entitled to redeem, the prospective redemptioner is required to pay his proportionate share of the personal property tax, which is included in the same assessment with the real property sought to be redeemed and other real property, together with other legal charges. Said opinion was based on Sections 271 and 272 of the Revenue Act of 1935. Based on the holding of said opinion, it is my judgment that your inquiry should be answered as above stated.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 7, 1941.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Mobile County—Sheriffs—Fees—

It is the duty of the Sheriff of Mobile County to collect and remit all charges, fees and compensation, authorized to be collected by him, to the County Treasury of Mobile County, other than those payable to him directly out of the County Treasury.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 23, 1940, in which you request my official opinion as follows:

"In view of the fact that the Sheriff of Mobile County is now on salary in lieu of fees I respectfully request Your Honor's opinion on the following question, viz:

"Am I or not required to pay the Sheriff's Fees which are earned for the County and collected by me to the County Treasurer or am I required to remit the same to the Sheriff"

The Sheriff of Mobile County went on a salary basis on November 15, 1940, the effective date of Act No. 594, H. 1044, approved June 18, 1940, (Local Acts, 1939, page 355). See opinion to you under date of December 18, 1940.

I call your attention to Section 2 of said Act which is as follows:

"Section 2. That when this Act goes into effect said Sheriff of Mobile County shall continue to collect all charges, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall, during the last five (5) days of each calendar month pay into the County Treasury of Mobile County, Alabama, all such monies received or collected by him during the month or part thereof, next preceding the date of such settlement or payment."

You will note from the above quoted section that from the effective date of the Act, supra, the Sheriff of Mobile County shall continue to collect all charges, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall during the last five days of each calendar month pay into the County Treasury of Mobile County, Alabama, all such monies received or collected by him during the month or part thereof, next preceding the date of such settlement or payment.

Therefore, it is my opinion that the duty of remitting these charges, fees, etc., to the County Treasury is placed on the Sheriff and not on the Clerk of the Court.

However, any fees which are payable to the Sheriff directly from the County Treasury need not be paid to him, to be in turn remitted by him to the County Treasury, as such would be an unreasonable and unnecessary procedure. Cf. Opinion in Quarterly Report of Attorney General, Volume IV, page 136.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 9, 1941.

Hon. Henry W. Sweet,
County Commissioner,
Commission of Jefferson County,
Birmingham, Alabama.

Jefferson County—Board of Registrars—Civil Service Law—

Employees of the Roard of Registrars in Jefferson County are not subject to the Jefferson County Civil Service Law but are amenable to the Alabama Merit System Act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion, bearing date of January 3, 1941, is as follows:

"Please give me your opinion as to whether or not the employees of the Board of Registrars in Jefferson County are under the Jefferson County Civil Service Law or the State of Alabama Civil Service Law."

Your first inquiry, that is, whether the employees of the Board of Registrars in Jefferson County are subject to the Jefferson County Civil Service Law has been answered in the negative by the Supreme Court of Alabama in the case of **Garner, County Treasurer v. McCall,** 235 Ala. 187, 178 So. 210. In that case, it was held that the Board of Registrars of Jefferson County is an independent agency of the State for a state-wide purpose rather than a county authority.

In view of the conclusion reached in that opinion, i.e., that the Board of Registrars is a State agency, the employees of such Board would, in my opinion, be subject to the provisions of the State Merit System Act (Act No. 58, S. 44, approved March 2, 1939, Gen. Acts, 1939, page 68), which purports to apply to all employees in the service of the State of Alabama. In this connection, sub-section 11 of Section 3 of Act No. 58, supra, provides as follows:

"11. 'State Service' means all offices and positions of trust or employment in the Service of the Alabama State government, irrespective of whether the remuneration or compensation of such offices and positions of trust or employment be paid out of the State Treasury or not, but 'State Service' shall not include offices and positions of trust or employment of the local governmental subdivisions thereof, County or City Boards of Education, teachers and employees thereof, or those hereinafter exempted from this Act."

It is clear from the foregoing provision that employees of the Board of Registrars of Jefferson County are in the "State Service".

Your attention is called to subdivision (c) of Section 10 of Act No. 58, supra, which places these employees in the "classified service" of the state service, for this subdivision provides that the "classified service" shall include all officers and positions in the state service other than those noted in the exempt and unclassified service. Since it does not appear that employees of boards of registrars are placed in either the exempt or unclassified service by any provisions of Act No. 58, supra, it follows that such employees will come within the classified service.

Your attention is also directed to subdivision (b) (1) of Section 10 of Act No. 58, supra, which provides that "The Unclassified Service shall include: (1) One confidential assistant or secretary for each Board, Commission and elected officer."

This provision, of course, authorizes the board to employ one confidential assistant or secretary who will be in the unclassified service.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 9, 1941.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

Jefferson County—County Commission—Local Acts, 1932, page 84, construed—

No authority of law exists for the payment by Jefferson County of fees for attendance upon real estate classes by county employees.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of December 30, 1940, is as follows:

"There has been presented to the County Commission of this County a claim for a set of Text material, and enrollment fees in Real Estate Class, for two County employees in the County Road Department.

"I have not been able to find any legal authority for paying such claim.

"In opinions of the Attorney General, as found in Quarterly Reports volume No. 8, page 163, and in Biennial Reports 1936-38, page 759 your

office holds that a County is without legal authority to pay claims for sending County Employees who operate County Tractors to Tractor Schools.

"I will appreciate you advising me at your earliest convenience if the claim as stated in paragraph one, is a legal and valid claim against Jefferson County."

In reply, I wish to advise that in my opinion no authority of law exists for the payment by the county of the claims outlined in your request. The opinion of the Attorney General reported in Quarterly Report of Attorney General, Vol. VIII, page 163, referred to by you, holds that under the general laws of Alabama no authority exists for the payment by a county of a claim for the expense of tractor drivers for attendance in a tractor school. In my judgment, your statement of facts present an analogous situation and no authority under the general law exists for the expenditure here named.

I am familiar with Act No. 198, H. 596, approved November 3, 1932 (Local Acts, 1932, page 84) which is applicable to Jefferson County, Alabama. Section 13 of this act provides as follows:

"Section 13. That said commission may at its discretion pay out of county funds the traveling or other expenses of any county officer or employee, when such officer or employee creates such expense under the order or direction of such commission."

In my judgment, the authority here granted is limited to the payment of expenses of officers or employees which are incurred in the pursuance of county business and which expenses have been incurred by order of the county commission previously made. (See opinion of Attorney General, Quarterly Report, Vol. 12, page 153). In my judgment, the fees and expenses of employees attending real estate classes cannot be said to be any more a part of the official business of the county than the expenses of county employees attending a school for the instruction of tractor drivers as heretofore pointed out. In my opinion, the words "other expenses" set out in Section 13 of the Local Act of 1932, page 84, quoted supra, cannot include the expenses here named and in my judgment no authority of law exists for the payment of the same by Jefferson County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 9, 1941.

Hon. T. M. Perry,
President, Board of Revenue,
Marengo County,
Linden, Alabama.

Marengo County—Board of Revenue—President, Board of Revenue —Traveling expenses—

The provisions of Section 11 of Act No. 311, H. 904, approved September 19, 1923 (Local Acts, 1923, page 188) as amended by Section 3 of Act No. 242, S. 371, approved August 11, 1927 (Local Acts, 1927, page 147) do not prohibit the drawing of mileage by the President of the Board of Revenue of Marengo County in excess of the $800.00 maximum per annum allowed him for services as a member of said board at the rate of $10 per day.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of December 23, 1940 follows:

"Please give me an opinion on the following:

"Do the local acts of 1923, page 188, and 1927, page 146, prohibit me from drawing mileage, in excess of the $800.00 allowed me for service and mileage, on trips made out of my County?"

My answer to your inquiry is in the negative.

Your attention is called to Section 11 of Act No. 311, H. 904, approved September 19, 1923 (Local Acts, 1923, page 188) as amended by Section 3 of Act No. 242, S. 371, approved August 11, 1927 (Local Acts, 1927, page 147) which reads as follows:

"Section 11. That the members of said Board of Revenue shall each be entitled to Ten Dollars per day for each day of actual service rendered; five cents per mile for traveling to and from the sittings of said Board of Revenue, and to and from the place where any service is rendered by them, to be paid out of the County Treasury on certificates or warrants signed by the president, or president pro tem, of the Board of Revenue; provided that no member of the Board of Revenue shall, during any year, receive more than Eight Hundred Dollars from the County Treasury for any and all services rendered by him either as a member of the Board or for any work or labor done for, or services rendered to the County."

It is my opinion that under the language of the above quoted section it is clear that the $800.00 therein referred to, limits only the amount you may receive in any one year for services rendered by you, at the rate of

$10. per day, as a member of the Board, and is separable from the five cents per mile allowed you for traveling expenses. In other words, if you have drawn $800 in any one year at the rate of $10 per day for each day actually rendered in service to the Board, this, in my opinion, would not prohibit you from drawing an additional amount at the rate of five cents per mile for traveling to and from the sittings of the said board, or to and from the place where any service is rendered by you. Further, in my judgment, the amount which you draw at the rate of five cents per mile for traveling expenses is limited only by the number of miles which you travel, and not by the $800.

This conclusion, in my opinion, is in accordance with the plain, clear and unambiguous language of the above quoted section, and where the language of a statute is plain, clear and unambiguous, there is no room for construction. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 9, 1941.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Taxation—Tax exemption granted under Section 4 of Act No. 194, H. 324, approved July 10, 1935, (General Acts, 1935, page 256) includes exemption from county general school and special district school taxes.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated January 4, 1941 follows:

"Please refer to Section 4, page 262, General Acts of 1935 and advise me whether or not a concern granted tax exemptions under this act is entitled to exemption on County General School and Special district school taxes.

"The American Cyanamid & Chemical Corp. own property in this County and I have presented them a statement of their taxes, which includes ALL SCHOOL Taxes, and which they have refused to pay, basing their contention on three Supreme Court decisions, namely:

"Crow vs. General Cable Corp. 137 Southern 657. Pullman Car & Mfg. Co. vs. Hamilton 155 Southern 616 and 181 Southern 244.

"After studying these decisions, I am inclined to agree with them, however, before doing so, I would like for you to render me an opinion, and then I will know just what is right.

"Please let me hear from you as soon as possible, as I am holding up this company's check."

In my opinion your question should be answered in the affirmative.

Section 4 of Act No. 194, H. 324, approved July 10, 1935 (Gen. Acts, 1935, page 256) provides as follows:

"Section 4. All real and personal property, except lands upon which located, of factories of (sic) plants, manufacturing calcium cynamid (lime nitrogen), aluminum or aluminum products, shall be exempt from state, county and municipal taxation for ten (10) years after the beginning of the construction of such plant or factory."

In **Pullman Car and Mfg. Corp. of Alabama v. Hamilton**, 236 Ala. 209, 181 So. 244, our Supreme Court, in construing the tax exemption under Section 3023 of Michie's Code of 1928, held that "taxes for all county and municipal purposes" includes taxes for general county and city purposes and special county and city school taxes.

See also: **Pullman Car & Mfg. Corp. of Alabama v. Hamilton**, 229 Ala. 184, 155 So. 616; **Hamilton v. Pullman Car & Mfg. Corp. of Alabama**, 231 Ala. 7, 163 So. 329-30; and the following opinions of this office which hold that exempted corporations under Section 3023 of Michie's Code of 1928 are not liable for county school and district school taxes; Opinion to Hon. J. C. Merrill, Tax Collector, Covington County, Andalusia, Alabama, under date of April 15, 1935, Office Edition, Opinions of Attorney General, Vol. 3A, page 170; Opinion to Hon. Gowan Roberts, Tax Collector, Talladega County, under date of February 6, 1935, Office Edition, Opinions of Attorney General, Vol. 2A, page 108. Cf. Crow v. General Cable Corp., 223 Ala. 611, 137 So. 657.

Based on the authorities supra, it is, therefore, my opinion that the exemption from "state, county and municipal taxation" under Section 4 of Act No. 194, supra, includes exemption from county general school and special district school taxes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 13, 1941.

Hon. J. F. Smith, Clerk,
Circuit Court, Escambia County,
Brewton, Alabama.

Clerk of the Circuit Court—Office and Officers—Term of Office—

The term of office of the incumbent Clerk of the Circuit Court expires at midnight on Monday after the second Tuesday in January next after the election of his successor.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your letter of January 7, 1941, in which you request an official opinion, is as follows:

"Please give me your official opinion on the following:

"Sec. 2567 of the Code of Alabama, 1923 provides that Clerks of the Circuit Court shall hold office for a term of six years from the First Monday after the second Tuesday in January next after their election.

"In this instance the first Monday after the second Tuesday in January of this year comes on the 20th day of January and I would like to know if the incoming Clerk would take over the duties of the office at 12 o'clock midnight January 19th or 12 o'clock midnight January 20th."

It is my opinion that the term of office of the incumbent Clerk of the Circuit Court expires at midnight on Monday after the second Tuesday in January next after the election of his successor.

In the particular instance under consideration, the newly elected Clerk of the Circuit Court will take over the duties of the office at twelve o'clock midnight, January 20, 1941.

Section 2567 of the Code of Alabama, 1923, declares that Clerks of the Circuit Court

"when not otherwise provided for by law, shall hold their respective offices for the term of six years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Section 116 of the Constitution of 1901 provides in pertinent part:

"The governor, lieutenant-governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education and com-

missioner of agriculture and industries, elected after the ratification of this constitution, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday in January next succeeding their election, and until their successors shall be elected and qualified."

It will be noted that the language defining the time of commencement and expiration of the term of office in both Section 2567 of the Code of 1923, and Section 116 of the Constitution of 1901 is almost identical, the only variance being that the section of the Constitution employs the word "succeeding" and Section 2567 employs the word "after", which I do not regard as material.

The Supreme Court in the case of **Oberhaus v. State,** 173 Ala. 483, 55 So. 898, held that Section 116 of the Constitution:

"* * * must be construed as fixing the terms of the Governor and other state officers therein named as beginning on Tuesday, and as not including the Monday from which the terms begin to run; and that the meaning is too plain to permit of alteration by legislative enactment or popular usage.

"We therefore hold that Gov. Comer's term of office de jure expired at midnight on Monday, January 16, 1911; and consequently Gov. O'Neal's term de jure began on and with the Tuesday following."

Cf. Biennial Report of Attorney General, 1928-30, page 117.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 13, 1941.

Hon. J. B. Van Valkenburgh, Chairman,
Madison County Board of Commissioners,
Huntsville, Alabama.

Counties—Alabama Beverage Control Act—Licenses—

Counties held without authority to charge fee for transfer of malt or brewed beverage license. Where such fee has been levied and collected it may be refunded.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of December 21, 1940, is as follows:

"In March 1937 the Board of County Commissioners of Madison County adopted a resolution that no license issued by the Alabama Alcoholic Beverage Control Board could be transferred until application for the consent of the Board of Commissioners for such transfer be filed in writing with the Board accompanied with a deposit of $5.00 paid to the said Board for the use and benefit of the General Fund of Madison County.

"On November 18th, 1940, an application was presented to the Board of Commissioners for a transfer of license for the sale of malt or brewed beverages accompanied with a deposit of $5.00. The Board by proper resolution consented to this transfer.

"When application was made for this transfer to the Alabama Alcoholic Beverage Control Board they did not agree to this transfer.

"Will you please give the undersigned an opinion on the right of the Board of Commissioners to refund the $5.00 that was paid to the County under the resolution above referred to?"

In reply wish to advise that the answer to your question is first and necessarily influenced by the determination of the legality of the transfer charge made by the county. The Alabama Beverage Control Act, Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937, (General Acts 1936-37, page 40), contains definite provisions relative to the authority of a county to levy a license on retail dispensers of malt or brewed beverages in the county. See Subsection 3 of Section 22 of Act No. 66, supra, and Quarterly Report, Attorney General, Vol. VII, page 1. However, there is no authority contained in said act for the levying of the transfer fee in question. The principle of law is well founded that counties have no inherent right to levy taxes. This authority is confined to that delegated to the counties by the Legislature. **Phoenix Carpet Co. v. State,** 118 Ala. 143, 22 So. 627. This office has heretofore held in an opinion reported in Quarterly Report, Attorney General, Vol. VII, page 89, as follows:

"* * * It will be noted that the licenses which counties have the authority to levy by virtue of the provisions of the Alabama Beverage Control Act, are the only licenses, taxes, or fees which the act authorizes the counties to levy."

In my judgment, no authority of law exists for the levy of the $5.00 transfer fee outlined in your request, and the resolution of the board of county commissioners so levying the said fee is void ab initio.

Under these circumstances, the claim for the fee so paid becomes a claim against the county and may be paid by the county under authority of Section 6755(4) of the Code of Alabama, 1923, which provides as follows:

"6755. Authority of Court.—The Court has authority—4. To examine, settle, and allow all accounts and claims chargeable against the county."

See Opinion of the Attorney General, Quarterly Report, Vol. XVIII, page 409, 410.

Premises considered, it is my opinion that the Board of County Commissioners is authorized to refund the $5.00 that was paid to the county under the resolution set out in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 14, 1941.

Hon. Joe Patton,
Tax Collector,
Sumter County,
Livingston, Ala.

Poll tax—Exemptions—Military Service—

1. Persons who are drafted into, or voluntarily enter, the military or naval service of the United States held not entitled to exemption from payment of poll tax.

2. Persons who were active officers or enlisted members of the Alabama National Guard or Naval Militia at the time of their induction into the active military or naval service of the United States held entitled to exemption from payment of poll tax during period of such service.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 28, 1940, in which you request my official opinion as follows:

"Does a party that has been drafted or one who volunteers into the military service have to pay poll tax? If not for what year will they be exempt? John Doe is drafted on September 30th, 1940, does he owe poll tax for 1940? Bill Smith is drafted on October 1st, 1940, does he owe poll tax for 1940?

"I will appreciate you giving me this information at your earliest convenience for the reason that so many men are awaiting your answer before they pay up."

The questions presented in your letter of inquiry have been heretofore considered by this office in an opinion to Hon. A. L. Nettles, Tax Collector, Monroe County, Monroeville, Alabama, under date of July 20, 1940, Quarterly Report of Attorney General, Volume XX, page 97, in which it was held:

"1. Persons who honorably served in the army or Navy of the United States during the period between January 1, 1917, and November 11, 1918, are exempt from payment of poll tax.

"2. Active officers and enlisted men of the National Guard are exempt from payment of poll tax.

* * *

"4. Military service, except in the above cases, does not carry poll tax exemption."

Under the holdings of this opinion, a person who is drafted into, or voluntarily enters, the military or naval service of the United States would not be exempt from the payment of poll tax during the period of such service.

Your attention is called to the provisions of Section 13 of the Military Code of Alabama, Act No. 143, H. 63, approved April 22, 1936, General Acts, 1936, page 105, which reads:

"Section 13. SERVICE IN THE UNITED STATES ARMY SHALL BE CONSIDERED SERVICE IN THE NATIONAL GUARD : Service in the National Guard or Naval Militia of Alabama when called, drafted, or ordered into the service of the United States shall be considered as equivalent service in the Alabama National Guard or naval Militia for any and all States purposes regarding privileges, honors, pay, allowances, and exemptions provided by law for members of the National Guard and Naval Militia of Alabama."

By virtue of the provisions of said section, a person who was an active officer or enlisted member of the Alabama National Guard or Naval Militia at the time he was inducted into the active military or naval service of the United States would be entitled to exemption from the payment of poll tax during the period of such service just as though he were still an active officer or member of the Alabama National Guard or Naval Militia. For your information in regard to the time when the exemption from poll tax by reason of service in the Alabama National Guard or Naval Militia begins, you are referred to opinions of this office to Hon. T. C. Almon, Judge of Probate, Morgan County, Decatur, Alabama, under date of December 5, 1939, Quarterly Report of Attorney General, Vol. XVII, page 338, and to Hon. John S. Golson, Judge of Probate, Butler County, Greenville, Alabama, under date of April 18, 1940, Quarterly Report of Attorney General, Vol. XIX, p. 67.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 17, 1941.

Hon. A. R. Forsyth, Director,
State Department of Finance,
THE CAPITOL.

Schools—Teachers—Teachers' Retirement System—Funds—Investment of—

1. The Board of Control of the Teachers' Retirement System of Alabama is authorized to enter into contract for the purchase of bonds for future delivery when the amount involved is not in excess of the presently available assets under its management.

2. Such contract held not to violate Section 213 of the Constitution of 1901, as amended, in that it neither creates nor incurs any new debt against the State.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion, bearing date of January 13, 1941, is as follows:

"Pursuant to Act No. 419, Acts of Alabama, 1939, page 559, the Teachers' Retirement System of Alabama was duly established and the Board of Control organized.

"The surplus in the General Fund as of September 30, 1940, $150,606.44 was paid into the State Treasury to the credit of the Teachers' Retirement System, and Alabama bonds of the par value of $115,000.00 purchased and deposited with the State Treasurer as provided by law.

"The Board of Control of the Teachers' Retirement System desires to purchase for delivery on September 30, 1941, $40,000 of bonds of the State Teachers College at Florence and $40,000 of bonds of the State Teachers College at Jacksonville on the assumption that funds will be available from the 1941 appropriation of $400,000.00.

"Should the appropriation not be available in sufficient amount, it is proposed to sell sufficient of the bonds now held to provide funds for the purchase.

"Please advise me if the Board of Control of the Teachers' Retirement System is authorized and empowered to enter into a contract with Marx & Company, a corporation, in form as follows to effectuate the purchase of the Teachers' College Bonds referred to:

" 'The Board of Control
Teachers' Retirement System of Alabama
Montgomery, Alabama

" 'Dear Sirs:

" 'As principals, we are pleased to confirm sale to you of $40,000 State Teachers College at Florence Building Revenue 3¼ per cent bonds and $40,000 State Teachers College at Jacksonville Building Revenue 3¼ per cent bonds, as advertised for sale by the State Board of Education on January 13, 1941, at par and accrued interest, for delivery on September 30, 1941.

" 'We understand that you are purchasing these bonds from us for the account of the Teachers' Retirement System of Alabama, which will have the funds available for investment on September 30, 1941.

" 'The sale of these bonds to you is contingent on due delivery of the bonds to us with satisfactory legal opinion.

" 'Very truly yours,

.....

" 'The undersigned hereby confirms purchase of the above bonds on the basis set out above for the account of the Teachers' Retirement System of Alabama, this January ....., 1941.

.....' "

The Teachers' Retirement System of Alabama was provided for by Act No. 419, S. 362, approved September 15, 1939, (General Acts, 1939, page 559). The provisions of said Act pertinent to the instant inquiry are set out herein below:

"Section 2. NAME AND DATE OF ESTABLISHMENT. A retirement system is hereby established and placed under the management of the Board of Control for the purpose of providing retirement allowances and other benefits under the provisions of this act for teachers of the State of Alabama. The retirement system so created shall be established as of October first, nineteen hundred and forty, or as soon thereafter as the Governor by proclamation declares the funds accruing to the Teachers' Retirement System of Alabama are sufficient to meet the obligations of the 'normal contribution' on October 1st, of a year following October 1st, 1940. It shall have the power and privileges of a corporation and shall be known as the 'Teachers' Retirement System of Alabama', and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held in trust for the purpose for which received."

"Section 6. ADMINISTRATION. **Board of Control** (1) The General administration and responsibility for the proper operation of the retirement system and for making effective the provisions of the act are hereby vested in a board of trustees which shall be known as the Board of Control and shall be organized immediately after a majority of the trustees provided for in this section shall have qualified and taken the oath of office. * * * * (7) Subject to the limitations of this act the Board of Control shall, from time to time, establish rules and regulations for the administration of the funds created by this act and for the transaction of its business."

"Section 7. MANAGEMENT OF FUNDS. (1) The Board of Control shall be the trustees of the several funds created by this act as provided in Section 8, and shall have full power to invest and reinvest such funds, subject to all the terms, conditions, limitations, and restrictions imposed by the laws of Alabama upon domestic life insurance companies in the making and disposing of their investments; and subject to like terms, conditions, limitations and restrictions, the Board shall have full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which any of the funds created herein shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds."

Under the above quoted excerpts from said Act, the Board of Control of the Teachers' Retirement System of Alabama is vested with authority, from time to time, to establish rules and regulations for the administration of the assets under its management and for the transaction of its business; and plenary powers are vested in said Board of Control covering the investment and reinvestment of such assets and the disposition of securities and investments held by it. The only limitations or restrictions imposed upon such plenary powers are "the terms, conditions, limitations, and restrictions imposed by the laws of Alabama upon domestic life insurance companies in the making and disposing of their investments". An exhaustive investigation of the statutory laws of this State fails to reveal any "terms, conditions, limitations and restrictions imposed by the laws of Alabama upon domestic life insurance companies in the making and disposing of their investments".

Consequently, in my opinion, the Board of Control of the Teachers' Retirement System of Alabama is authorized and empowered to enter into a contract for the purchase of such bonds for future delivery, the amount involved in the transaction not being greater than the presently available assets under its management; and that such a contract is not violative of Section 213 of the Constitution of Alabama, 1901, as amended, in that it does not create or incur any new debt against the State.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 17, 1941.

Mrs. Pauline K. Barnes,
Clerk and Register,
Circuit Court, Dallas County,
Selma, Alabama.

Circuit Clerks—Registers in Equity—Funds—Deposits—Depositors —Dallas County—Constitutional Amendments—

1. Clerk of Circuit Court and Register in Equity of Dallas County, under Constitutional amendment placing such officers on a salary basis, should cover monies, belonging to the county received in their official capacities, into the County Treasury monthly.

2. Deposit of monies, coming into the hands of Clerks of Circuit Court and Registers in Equity in their official capacities, in banks, procedure to be followed in regard thereto, and liability therefor, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Mrs. Barnes:

Your letter of January 8, 1941, in which you request an official opinion, is as follows:

"Please advise me whether, under the Constitutional Amendment (Acts, 1939, Page 896) recently adopted, placing the offices of Clerk and Register of the Circuit Court of Dallas County, Alabama on a salary basis, I must pay the money, each day, belonging to the County, coming into each of the offices, to the County or whether I can designate some bank or banks here in the City of Selma, within which to make, each day, deposits of money coming from the Clerk's office to the credit of Pauline K. Barnes, Clerk of the Circuit Court of Dallas County, Alabama, and that coming into the Register's office, to the credit of Pauline K. Barnes, Register of the Circuit Court of Dallas County, Alabama and then each month, to pay over to the County Treasurer the money that belongs to Dallas County, or advise me just how I should handle, under said amendment, money collected by me each day from each of the above offices, belonging to the County.

"Can I designate the bank in which I can keep other moneys coming into the Clerk or Register's offices that do not belong to Dallas County, but to litigants in said Court, or should the Board of Revenue of Dallas County, Alabama, designate the bank or banks in which all deposits should be made?"

Your request presents several inquiries which will be considered seriatim.

1. Must I pay the County each day monies belonging to the County which come into each of the offices which I hold?

It is my opinion that you are not required to cover into the County Treasury each day monies belonging to the county which are received by you, under any language of the Constitutional Amendment relating to Dallas County, which was ratified by the people at the last general election, said amendment having been submitted by Act No. 566, H. 849, passed by the Senate September 12, 1939, concurred in and passed by the House of Representatives September 15, 1939 (General Acts, 1939, page 896). The only requirement of this amendment, as to the disposition of funds coming into the hands of the various officers therein dealt with, is that "the above named officers are hereby required to collect all charges of court, fees, commissions, allowances, percentages, salaries or other compensation provided by law, other than the salaries herein fixed and to cover the same into the county treasury."

There can be no question that you are required to cover the monies belonging to the county so received by you into the county treasury. However, the time these monies should be covered into the county treasury is an administrative detail. Any rule providing for the covering of such monies into the county treasury within a reasonable time after the same are received by you would be satisfactory. I suggest, however, that a rule providing for the covering of such monies into the county treasury monthly, and not later than the tenth day of the month following the month in which they are received, would be the most satisfactory. This is the requirement generally made by statute as to the time when monies received by various county officials should be covered into the State or county treasury as the case may be. See Section 365 of the 1935 Revenue Act, covering remittances to the State and county treasuries by the Judge of Probate of the license monies collected by him. Cf. opinion to Hon. Charles W. Lee, State Comptroller, Capitol, under date of October 18, 1937, (Biennial Report of Attorney General, 1936-38, page 434).

2. May I designate some bank or banks here in the City of Selma with which to make, each day, deposits of money coming from the clerk's office to the credit of Pauline K. Barnes, Clerk of the Circuit Court of Dallas County, Alabama, and that coming into the Register's office to the credit of Pauline K. Barnes, Register of the Circuit Court of Dallas County, and then each month pay over to the county treasury the money that belongs to Dallas County?

You may designate some bank or banks in the City of Selma with which to make deposits of money belonging to the county received by you in your official capacities, pending disbursement, but if you deposit such monies in a bank so designated by you, you do so at your own risk. See **Montgomery v. Sparks,** 225 Ala. 343, 142 So. 769. However, you may deposit such funds in a bank designated by you, in compliance with the provisions of Section 3973 of the Code of Alabama, 1923, as amended by Act No. 113, H. 165, approved June 6, 1935, (General Acts, 1935, page 164) and be relieved of any criminal liability therefor. See **National Surety Company v. State,** 219 Ala. 609, 123 So. 202; opinion of the Attorney General to the Chief Examiner, Department of Examiners of Accounts, Capitol, under date of August 25, 1930 (Biennial Report of Attorney General, 1928-30, page 886).

On the other hand, you may, under the authority of Act No. 60, H. 366, approved March 10, 1933, (General Acts, 1933, page 51) make application to

the Court of County Revenues of Dallas County for the appointment of a bank or trust company as a depository in which you may deposit monies coming into your hands in your official capacities. Section 2 of said Act reads as follows:

> "Section 2. Upon the application of the County Tax Collectors, County Treasurers, Probate Judges, Circuit Court Clerks, and/or Registers of the Circuit Court, it shall be the duty of the Court of County Commissioners, Boards of Revenue, or other like governing body of the County to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such court, Board of Revenue or other governing body. Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State."

In such event, if any of such funds are dissipated or lost by reason of the insolvency or failure of said bank or trust company, such dissipation or loss will not constitute a liability on your official bond, or a liability on the sureties thereon. See Section 4 of Act No. 60, supra. The time for the payment of the monies belonging to the county into the county treasury has been set out above.

> 3. May I designate the bond in which I may keep monies coming into my hands in my official capacities that do not belong to Dallas County, but rather belong to litigants in the court, or should the Court of County Revenues of Dallas County designate the bank or banks in which all deposits should be made?

On the basis of the authorities cited and quoted from in answer to your question number 2, it is my opinion that the same rule or rules would apply to the deposit of monies, coming into your hands in your official capacities that belong to litigants in the court, as apply to monies coming into your hands in your official capacities that belong to the county. However, your attention is called to the fact that, as to monies coming into your hands in your official capacity over which the court has control, you must handle such monies as directed by the orders of the court, and in such event you incur no liability, either criminal or civil, therefor. See **Shelley v. Thomas,** 232 Ala. 227, 167 So. 316; opinion of the Attorney General to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, under date of May 15, 1939 (Quarterly Report of Attorney General, Vol. XV, page 141); and to Hon. L. E. Hall, Register, Pike County, Troy, Alabama, under date of September 30, 1939 (Quarterly Report of Attorney General, Vol. XVI, page 304).

In your letter of inquiry you make reference to "deposits of money coming from the clerk's office to the credit of Pauline K. Barnes, Clerk of the Circuit Court of Dallas County, Alabama, and that coming into the Register's office, to the credit of Pauline K. Barnes, Register of the Circuit Court of Dallas County, Alabama." It is my opinion that such deposits should be in the name of Pauline K. Barnes, as Clerk of the Circuit Court of Dallas County, Alabama, and, Pauline K. Barnes, as Register of the Circuit Court of Dallas

County, Alabama. The courts of this State have held that the use of the word "clerk" or the words "Probate Judge" after the name of a person making a deposit are descriptio personae, and do not change the character of a deposit from that of an individual to that of an official. **Enzor v. State,** 27 Ala. App. 60, 167 So. 336, Cert. Den. 232 Ala. 257, 167 So. 340; **First National Bank v. American Surety Company of New York,** 237 Ala. 35, 185 So. 365.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 17, 1941.

Hon. James A. McCollum,
County Solicitor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Counties—Deputy Solicitors—

County not required to furnish Deputy Solicitor with office space.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your request for official opinion under date of January 11, 1941, is as follows:

> "Is there any legal duty on Tuscaloosa County or the Board of Revenue of Tuscaloosa County to furnish the Deputy Solicitor of Tuscaloosa County with a position in the Court House if office space is available?"

In an opinion rendered to Hon. Joe M. Bonner, Deputy Solicitor, Wilcox County, under date of August 26, 1940 (Quarterly Report of Attorney General, Volume XX, page 191), it was held that the county was not required to provide suitable offices for the use and occupancy of Deputy Solicitors. Cf. Quarterly Report of Attorney General, Volume XVII, page 289.

Section 6755, Sub-section 1, Code of Alabama, 1923, as amended by Act No. 75, H. 150, approved February 18, 1927 (General Acts, 1927, page 57), provides in part apropos as follows:

> "6755. Authority of court.—The court has authority—1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including

the circuit judge, if resident in the county, and to change the location of the courts, and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and pay the rental from the county fund. * * *"

Section 6755 of the Code of Alabama, 1923, was subsequently amended by the Legislature of 1931 and 1933 in respects not here material.

It will be seen from the above that the furnishing of offices in the court house is a matter under the direction and control of the county governing body. I know of no authority of law which makes it incumbent upon said governing body to furnish a Deputy Solicitor with office space therein. Cf. Quarterly Report of Attorney General, Volume XVII, page 353.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1941.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Costs and Fees—Officers—Uniform System of Accounting.

Certificate of claims of officers, as required by Sections 3740 and 4040, Code of Alabama, 1923, held governed by requirements of Chief Examiner of Accounts that individual cases be listed and certified by officers having claims therein.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of December 18, 1940, is as follows:

"Under Sections 3740 and 4040 of the Code of Alabama, 1923, there is set out the procedure which must be followed by the Clerks of Court and Sheriffs in filing claim for the collection of costs and fees due them.

"Section 3740 requires the Clerk and Sheriff to make affidavit of the amount due them before the circuit or probate judge before the costs and fees may be paid them out of the fine and forfeiture fund; and, Section

4040 requires these officials to make a statement under oath of the amount of such fees due them respectively, setting out the style of each case and the term at which judgment was rendered.

"Heretofore the Sheriff and Clerk have filed statements under oath setting out the style of each case and the term at which judgment was rendered, but one affidavit was sufficient for a number of such cases so itemized.

"I have recently been delivered by the Sheriff and Clerk a book which contains 175 cases each, with each case a separate one, and a separate oath and acknowledgement accompanying each such case, with the Probate Judge printed on each as the proper officer to take the acknowledgement and to administer the oath. This will require the signing of 350 cases by the probate judge and the administering of 350 oaths.

"It is mandatory under these sections that each such case be a separate one and carry the oath and acknowledgement, or can a number of such cases be itemized on one statement and let one oath and acknowledgement suffice for that particular number?"

In reply, I wish to advise the answer to your question is controlled by the provisions of Act No. 26, H. 49, approved February 8, 1935 (General Acts, 1935, page 43), which act provides for establishing and maintaining a uniform system of accounting and reporting in county offices.

I am advised by the Chief Examiner of Accounts that, under authority of the above cited law, forms have been provided and furnished to county officers upon which to make certifications provided for by Sections 3740 and 4040 of the Code of Alabama, 1923. These forms set out the style of the case, the case number, the court in which the case is tried, the term of court during which the case is tried, the offense with which the defendant is charged, the disposition of the case and date thereof, the issuance and return of execution and date thereof, with the affidavit of the officer claiming fees in the case, and the acknowledgement of the Judge of Probate. An itemized statement of the fees due to the officer in the case is likewise set out in the said form. These forms are required by the Chief Examiner of Accounts, under authority set out in the above cited Act of 1935, and require the certification of the officer interested in the fees and the acknowledgement of the Probate Judge in each separate case.

I wish to call your attention to Sections 1, 2 and 3 of the above cited 1935 Act, which provide in part as follows:

"Section 1. That the State Comptroller, with the approval of the State Auditor and Chief Examiner of Accounts, is hereby required to prepare as soon as practicable after the passage and approval of this Act such forms of bookkeeping and accounting books, records, reports, and other blank forms as may be necessary for the installation of a uniform system of accounting and reporting in and for the County offices

of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds or other funds, and to transmit to such officers copies of such forms."

"Section 2. That all such County officers shall, after the provisions of this Act become of full operation and effect, be required to keep the accounts and make reports of their respective office in full accordance with the system of accounting and reporting so established and on the forms and records prescribed by the State Comptroller."

"Section 3. That the provisions of this Act shall become fully operative and effective and a Uniform System of Accounting and Reporting in County offices shall be established by October 1, 1936, and, after that date it shall be unlawful for any County officer to wilfully fail or refuse to keep the accounts of his office or to make required reports according to the system of accounting and reporting so established, which shall be the official system of Uniform Accounting and Reporting in County offices."

You will note that the provisions of the above quoted act of 1935 compel the use of the system of accounting and reporting so established. Cf. Quarterly Report of Attorney General, Vol. XII, page 142; Quarterly Report of Attorney General, Vol. XIV, page 121.

Premises considered, it is my opinion that it is mandatory that each such case be a separate one and carry the oath and acknowledgement as set out hereinabove.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 21, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
CAPITOL.

Taxation—Licenses—Motor Vehicles—Motor Carriers—Statutes—

1. Schedule 158.15 of the 1935 Revenue Act, as last amended, held not altered, amended or repealed by Act No. 664, H. 791, approved July 5, 1940, (General Acts, 1939, page 1050) or Act No. 669, H. 792, approved July 5, 1940, (General Acts, 1939, page 1064).

2. Compliance by a motor carrier with the provisions of said schedule of the 1935 Revenue Act, as last amended, does not relieve such carrier from compliance with the applicable provisions of said 1939 acts.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion of November 28, 1940, is as follows:

"Re: Schedule 158.15 of the General Revenue Act of 1935, as amended.

"Your opinion is hereby respectfully requested as follows:

"1. Whether or not said Schedule 158.15 of the General Revenue Act of 1935, as amended, is still in force and effect or if the same was repealed by the enactment of Act No. 664 of the Legislature of Alabama approved July 5, 1940 (General Acts of 1939, pp. 1050 and 1064).

"2. Will compliance by a motor carrier with the provisions of said schedule relieve such carrier from compliance with the requirements of otherwise applicable provisions of said Acts No. 664 and No. 669?"

Schedule 158.15 of the 1935 Revenue Act was first amended by Act No. S. 139, approved April 21, 1936, (General Acts, 1936, page 208) and was again amended by Act No. 402, H. 887, approved September 13, 1939, (General Acts, 1939, page 527). Said schedule, as last amended, reads as follows:

"Schedule 158.15. The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used for hire (or used for commercial purposes) in this State, for a period of 30 days from date of entering the State, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or Federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby; Provided further that nothing herein shall be construed to permit the use of motor vehicles for hire (or for commercial purposes) by non-residents without complying with the provisions of this Act. Provided further, that motor vehicles of non-residents used for commercial purposes and making not more than two trips per month, each such trip to be of not more than five days duration, may secure permit from the probate judge of the first county in this State which he enters, under such rules as the State Department of Revenue may prescribe and upon the payment to the probate judge of a permit fee of $1.00 and an issuance fee of 50c which permit shall grant the holder thereof two trips as above set forth during the month in which said permit is issued. Provided, that motor vehicles of non-residents used for hire and making not more than three trips during any period of three months in this state and which pay all mileage taxes required by law, may secure a permit from the State Department of Revenue under such rules as the State Department of Revenue may prescribe and upon the payment of a Five Dollar ($5.00) fee and an issuance fee of 50c for each trip to the probate judge; of the

first county entered in this State; provided each trip shall be reported to the State Department of Revenue and said probate judge and no such motor vehicle shall make more than three trips in this State during any three month period and no such motor vehicle shall carry anything but goods to be transferred from without the State to points within the State, but such motor vehicle may, on its return trip, secure permit from a probate judge after the additional payment of Five Dollars ($5.00) and an issuance fee of 50c, to carry goods on its return trip from points within Alabama to points without Alabama. Said permit shall be issued for a specified motor vehicle and shall not be transferable to any other person or any other vehicle. The State Department of Revenue of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other. The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter."

Said Schedule 158.15, as thus amended, is a part of Chapter 6 of Article 13 of the 1935 Revenue Act, which said chapter deals with the licensing and registration of motor vehicles in the State of Alabama, and provides the license fee levied by the State of Alabama upon motor vehicles, as such, for the use of the public highways of the State.

Act No. 664, supra, provides for a mileage tax upon motor carriers using the public highways of the State of Alabama, and Act No. 669, supra, provides for the regulation by the Alabama Public Service Commission of motor carriers using the public highways of the State of Alabama.

These two acts are the successors of Act No. 273, H. 53, approved June 19, 1931 (General Acts, 1931, page 303) and Act No. 159, H. 113, approved October 28, 1932 (General Acts, 1932, page 178), dealing with these same general subjects, which said acts are specifically repealed by Section 34 of Act No. 669, supra.

If Act No. 664, supra, or Act No. 669, supra, or any part or parts of said acts alter, amend or repeal Schedule 158.15, as last amended, supra, it is by necessary implication, since neither of said acts contains any provisions expressly amending or repealing said schedule as last amended, supra.

The title of Act No. 664 concludes "and to provide for reciprocity with other states."

Section 2 of said act, which is the section levying the mileage tax on motor carriers, contains the following proviso:

"Provided, however, that the rate of mileage tax of one-fourth cent (¼c) per mile, per axle, on all vehicles transporting property, for hire, shall be increased to one-third (1/3c) per mile, per axle, with respect to the operation of such vehicle, in the event the motor carrier operating

such vehicle is domiciled in Alabama and elects to operate the same in any other State under the provisions of any reciprocal contract or agreement hereafter entered into and then effective between the State of Alabama and such other State, and provided further that such increased tax shall not exceed the amount of any tax benefit thus accruing to such motor carrier by reason of such operation of such vehicle in such other State. Any such election shall be evidenced by written declaration thereof filed with the State Department of Revenue, and any such reciprocal agreement may contain provisions restricting the benefits thereof to motor carriers who have filed such declaration of election hereunder."

And Section 14 thereof reads:

"Section 14. The State Department of Revenue is hereby empowered to enter into reciprocal agreements or contracts with other States constituting a fair exchange of rights or privileges in regard to the use of the highways of this State by motor vehicles operated for hire under the provisions of this Act. The said reciprocal agreement or contract can be annulled on notice issued to either party by the other party thereto within 30 days thereafter."

These are the only provisions of either of said Acts that might be said to alter, amend or repeal Schedule 158.15, as last amended, supra. It might be argued that these provisions of Act No. 664, supra, have the effect of superseding the provisions of Schedule 158.15, as last amended, supra, in regard to the authority contained in said schedule, as last amended, for the State Department of Revenue of Alabama to enter into reciprocal agreements with other States for an exchange of rights for the operation of motor vehicles. However, I am persuaded that such an argument is not well founded for the reason that the reciprocal agreement provisions of Schedule 158.15, as last amended, supra, refer to the operation of motor vehicles, as such, whereas, the reciprocal agreement provisions of Act No. 664, supra, refer to the operation of motor vehicles as motor carriers. A reciprocal agreement executed by the State Department of Revenue of Alabama with another State under the provisions of Schedule 158.15, as last amended, supra, could only deal with the subject of the registration of, and the license on, motor vehicles, as such, for the use of the public highways of the State; and a reciprocal agreement executed by the State Department of Revenue of Alabama with another State pursuant to the provisions of Act No. 664, supra, could only deal with the subject of the mileage tax on motor vehicles, as motor carriers, for the use of the public highways of the State. As is readily seen, these are separate and distinct subjects. Since amendment or repeal of statutes by implication is not favored in the law, and there is, as pointed out above, a separate and distinct field of operation for the reciprocal agreement provisions of Schedule 158.15, as last amended, supra, and the reciprocal agreement provisions of Act No. 664, supra, I am of the opinion that said provisions of Act No. 664, supra, do not alter, amend or repeal, or affect in any manner whatsoever, said provisions of Schedule 158.15, as last amended, supra. This conclusion is in accord with the logic and reasoning of an opinion of this office to Hon. Ray Henson, Chief Clerk, Automobile Department, State Tax Commission, Capitol, under date of October 6, 1936, (Quarterly Report of Attorney General, Volume V, page 17) in which it was held that compliance with the provisions of Schedule 158.15, as first amended, supra, did not relieve a motor carrier,

otherwise so required to do, from complying with the applicable provisions of Acts No. 273, supra, and 159, supra, which, as pointed out above, were the forerunners of Acts No. 664, supra, and 669, supra.

In that opinion, the question for determination was whether or not the compliance by a motor vehicle with the provisions of Schedule 158.15, as first amended, supra, which was enacted after Acts No. 273, supra, and 159, supra, relieved a motor carrier, otherwise required so to do, from complying with the applicable provisions of said acts. Here we have the converse of that situation. Acts No. 664, supra, and 669, supra, which superseded Acts No. 273, supra, and 159, supra, were enacted after Schedule 158.15, as last amended, supra, and the question is whether or not compliance by a motor carrier with the provisions of said schedule, as last amended, supra, will relieve such carrier from compliance with the applicable provisions of Acts No. 664, supra, and 669, supra. It is my opinion that the compliance by a motor carrier with the provisions of Schedule 158.15, as last amended, supra, does not relieve such carrier, otherwise so required to do, from complying with the applicable provisions of Acts No. 664, supra, and 669, supra. See opinion to Mr. Henson, supra. You are referred to that opinion for an exhaustive treatment of this general subject and the general principles of law involved.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 22, 1941.

Hon. E. W. Vance, Member,
Board of Revenue, Barbour County,
Eufaula, Alabama.

Elections—Notice—Constitutional Amendments—Counties—

1. No authority of law for sheriff to publish notice of election on proposed constitutional amendments, and when same is published, neither county nor state is liable for cost of same.

2. County is liable for cost of notice of election for purpose of electing officers, published by sheriff pursuant to Section 447 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of January 9, 1941, is as follows:

"Presented a bill for a large sum of money for publication of the 'Eight Amendments to the Constitution' voted on November 5th., 1940, in

Barbour County, the Board of Revenue is doubtful as to whether this bill is to be paid by the County of Barbour or by the State of Alabama.

"We enclose you a copy of the notice published by the Sheriff of Barbour County in the Eufaula Tribune for four successive weeks. This notice shows on its face—just what was published and by whose authority. Is this to be paid by the State or the County?"

The copy of the notice of election which was enclosed with your inquiry shows that the Sheriff of Barbour County gave notice that an election would be held in the County of Barbour on Tuesday, the 5th day of November, 1940, for the purpose of electing officers for certain offices enumerated therein, and voting upon eight proposed constitutional amendments, the substance of each proposed amendment being set out therein.

Section 447 of the 1923 Code of Alabama provides as follows:

"447. **Notice by sheriff of election.**—The sheriff must give notice at least thirty days before each election, by publication in some newspaper in the county, if any is published therein, and if not, by writings posted at the courthouse door and at three other public places in the county, of the time of holding and the offices to be filled by such election. Such notice shall consist only of the date of the election and the officers to be voted for or subjects to be voted on."

The cost of the publication of the notice required by this Section is an expense that must be borne by the county. Opinion to Hon. J. N. Gray, Chairman, Walker County Commission, rendered under date of July 13, 1935 (Biennial Report of Attorney General, 1934-1936, page 226).

However, the Supreme Court of Alabama, in an advisory opinion to Hon. Frank M. Dixon, Governor of Alabama, under date of June 9, 1939 (238 Ala. 150, 192 So. 905), held that Section 447, supra, is not applicable to elections on proposed amendments to the Constitution, and that the only notice required to be given in regard to such elections is the notice that the Governor is required to give pursuant to Section 284 of the Constitution, as amended.

This office in an opinion to Hon. T. R. Snead, Judge of Probate, Cherokee County, rendered under date of August 9, 1939 (Quarterly Report of Attorney General, Volume XVI, page 131), after calling attention to the advisory opinion of the Supreme Court, mentioned above, held that there was no authority for the sheriff to publish notice of an election on proposed constitutional amendments, and that the cost of such notice was not a valid claim against the county. It follows from this opinion, and the advisory opinion of the Supreme Court mentioned above, that such notice, being without authority of law, will not support a claim against the State, either.

Therefore, the premises considered, you are advised that the cost of publishing that part of the notice which has to do with the election on the proposed constitutional amendments does not constitute a claim against

either the State or the County. The County is, however, liable for the cost of publishing that part of the notice relating to the election of officers for the certain offices enumerated therein. See opinion to Hon. J. N. Gray, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 22, 1941.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
State Department of Finance,
Capitol.

Sheriffs—Costs and Fees—Insane.

Persons — Arrests —

1. Sheriff not entitled to a fee for taking into custody and arresting and committing to jail insane person, not charged with criminal offense, pending inquisition.

2. Section 7287, Code of Alabama, 1923, providing fees for sheriffs for services in relation to persons of unsound mind applies only to fees for services rendered in connection with inquisitions of lunacy.

3. Expenses of conveying indigent insane patient to hospital should be computed from the county jail (Code of Alabama, 1923, Section 1445).

4. Authority of sheriff to commit an insane person to jail without mittimus discussed (Code of Alabama, 1923, Section 4531).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion, under date of January 4, 1941, is as follows:

"Please advise me on the following:

"1. Is the sheriff entitled to certain fees for **taking into custody or arresting,** and, **committing to jail,** insane persons or maniacs, pending inquisition as provided by Section 4581, Code of 1923? If so what fees?

"2. Has the sheriff or any other officer the authority to take into custody and commit to jail insane persons or maniacs without mittimus as provided by Section 4581, Code of 1923, and receive compensation or fees therefor?

"3. If the Judge of Probate certifies that an insane person taken into custody and committed to jail is indigent would the sheriff then be entitled to receive such fees from the county under Section 7287, Code of 1923, Sub-Section: 'Services in relation to persons of unsound minds?' If not what procedure would be necessary for such officer to receive such fees for said services?

"4. If the sheriff is not entitled to arrest and commitment fees under Section 4581, Code of 1923, should the necessary expense under Section 1445, Code of 1923, be computed from the point of taking into custody or from the county jail"

In treating your inquiry, I shall consider questions 1 and 3 together and then consider your other inquiries.

Answering your first question, you are advised that the sheriff is not entitled to a fee for taking into custody and arresting or committing to jail insane persons or maniacs pending inquisition. This office has heretofore held that there is no authority for the sheriff to receive an arrest fee for arresting and committing to jail an insane person unless such person is charged with a criminal offense. Biennial Report of Attorney General, 1936-1938, page 274; Biennial Report of Attorney General, 1926-1928, page 319.

Section 7287, Code of 1923, does not permit a different conclusion, even though the Judge of Probate certifies that an insane person, taken into custody and committed to jail, is indigent. This section, as pertinent, is as follows:

"Section 7287. Fees allowed to sheriffs. — Sheriffs are entitled to receive the following fees for the following services: * * * Services in relation to persons of unsound mind, the same fees as are allowed for similar services in other cases, to be paid out of the county treasury, if such person have no estate. * * *"

The above quoted provision is, in my opinion, intended to relate to costs accruing after the Judge of Probate has ordered an inquisition proceeding and does not apply to services rendered by the sheriff prior to such order. This conclusion is clear when the antecedents of Section 7287 are considered. Your attention in this regard is called to Section 3202 of the Code of Alabama, 1867 (Section 2763, Code of 1852), from which the above quoted portion of Section 7287 has been derived. Section 3202 of the Code of 1867 is a part of Chapter 12 of Article 2 of the Code of 1867, which chapter relates only to inquisition of lunacy. (Its predecessor in the Code of 1852, supra, was also a part of the chapter relating to inquisition of lunacy.) This section is as follows:

"Section 3202. Fees of judge, sheriff, jurors, and witnesses. — Upon any proceeding had under the provisions of this chapter, the sheriff and judge of probate are entitled to such fees as are allowed by law for similar services in other cases; and the jury and witnesses, to seventy-five cents per day during their detention, which unless otherwise provided in this chapter, must be paid out of the estate of the lunatic or idiot, on the certificate of the judge of probate. If he have no estate, the same must be paid out of the county treasury."

You will see from the foregoing section that the sheriff was limited in the Code of 1867 to the collection of fees under proceedings held under the provisions of Chapter 12. No provision is found in the Code of 1867 authorizing the Sheriff to receive fees for services rendered in such cases prior to the inquisition of lunacy.

It is my opinion that the above quoted portion of Section 7287 does not permit of an enlargement beyond this point, that is, that such portion cannot be extended to permit the sheriff to receive fees for services rendered prior to an inquisition proceeding ordered by the Judge of Probate. Accordingly, no arrest or commitment fees could be allowed. Moreover, reference to Section 3741, Code of 1923, shows that the fee allowed Sheriffs for arrests and the allowance provided for guarding prisoners, pertains only to criminal cases, i. e. misdemeanors and felonies, and consequently cannot be construed as applying to insanity proceedings. Cf. **Kilgore v. Swindle,** 219 Ala. 378, 122 So. 333; Biennial Report of Attorney General, 1936-1938, page 593. The opinion reported in Biennial Report of Attorney General, 1926-1928, page 274, is overruled in so far as it conflicts with the above conclusion.

In answer to your fourth inquiry, you are advised that the necessary expenses, under Section 1445 of the Code of 1923, of conveying an indigent patient to the hospital should be computed from the county jail. This has been the uniform conclusion of this office. See Quarterly Report of Attorney General, Vol. XIV, pages 31, 73. In the former opinion it was stated:

"In response to your inquiry, you are advised that each county in the State is chargeable with necessary expenses incident to transporting its indigent patients from the county jail to the State hospitals for the insane, **after they have first been adjudged insane, or of such mental deficiency as to require incarceration in such hospitals, by the Probate Judge in the county of their residence."** (Emphasis supplied)

In the latter opinion, it is stated with respect to Section 1445 that such section "applies only as to residents of the county who are ascertained to be insane and require hospitalization at insane hospitals." It is apparent from the foregoing opinions that the expenses are to be paid only after an ascertainment of insanity, which in turn could only come, under the facts which you detail in your question number 3, after the insane person has been committed to jail. See Section 4581, Code of Alabama, 1923, infra.

In answer to your second inquiry, you are advised that if an insane person is at large and not under the control, restraint or management of any person, such insane person may be taken into custody by the sheriff or

other officer or person. Section 4581 of the Code of Alabama, 1923, provides in this regard as follows:

"Section 4581. Arrest of insane persons or maniacs. — Any insane person who is at large and not under the control, restraint, or management of any person may be taken into custody or arrested by any officer or person and carried immediately to the probate judge of the county, who shall issue a mittimus or commitment of such insane person either to the county jail or insane hospital until inquisition proceedings may be had as to such persons so confined. Thereafter the person so confined shall abide by the decree or order of the inquisition proceedings.

"When such person is brought before the probate judge, if the judge shall be satisfied that the person brought before him is not insane, he may direct the discharge of such person from custody and arrest and decline to institute the proceedings of lunacy. But if the judge of probate be satisfied that such person is insane, or if he has a reasonable doubt as to his sanity, he shall have the person or persons so bringing the alleged insane person before him to institute the inquisition proceedings of lunacy as is now provided by law."

The right of a sheriff to commite a person to jail without process has been heretofore discussed at length in an opinion to Hon. U. G. Watford, Sheriff of Houston County, under date of December 7, 1940, Quarterly Report of Attorney General, Vol. XX, page 248. The discussion in the Watford opinion applies with equal force to the question of the right of a sheriff to place an insane person in jail without first obtaining a mittimus, where the circumstances are such as to present the immediate bringing of the matter to the attention of the Judge of Probate. In every instance, however, caution should be used so that the person is not held an unreasonable time before mittimus is obtained.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 24, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation — Tax Assessor — State Comptroller —

1. Tax assessor must assess property to any person returning the same for assessment and demanding that the same be assessed to him, regardless of the fact that such property may have been previously returned by, and assessed to, another.

2. Opinion to State Comptroller under date of October 28, 1940, commented upon and clarified.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of recent date, in which you request my official opinion, is as follows:

"In your opinion to State Comptroller, Mr. I. C. Heck, dated Oct. 28, 1940, I construe your opinion to be that the State Comptroller cannot set aside a sale where property is double-assessed.

"In Jefferson County we have hundreds of pieces of property that are double-assessed for the reason that the properties in question are estates or ownerships in litigation in Chancery or Circuit Courts. The property is claimed by two or more parties and each of them considers that he or she is the rightful owner and that same should be assessed by him or her.

"These cases are not settled before we have our assessments; therefore, the rightful owner has not been determined. None of them pay the taxes and the property goes to sale double-assessed.. The Jefferson County Special Act of the Legislature relating to the assessment and collection of taxes reads — 'The property shall be assessed to the last owner of record in the office of the Tax Assessor.'

"I would further like to know if the Tax Assessor can refuse to assess to any person any parcel of property that they demand to be assessed by them?"

In the opinion to Hon. I. C. Heck, State Comptroller, Capitol, under date of October 28, 1940, the principal questions there considered were whether or not a tax assessor is authorized to assess property to "owner unknown" where the records in the office of the judge of probate disclose a record owner of such property, and whether or not the State Comptroller had the authority to set aside a tax sale under the provisions of Section 232 of the 1935 Revenue Act after final settlement had been made by the tax collector, and the certificates of sale had been delivered by the Comptroller to the State Land Commissioner. In regard to the latter question, I concluded that the State Comptroller was without authority to set aside a tax sale under the provisions of Section 232 of the 1935 Revenue Act after final settlement had been made by the tax collector, and the certificate of sale had been delivered by the Comptroller to the State Land Commissioner. A previous opinion of this office appearing in Quarterly Report of Attorney General, Volume XVIII, page 144, was cited in support of that conclusion.

It is true that in his request to which that opinion was in answer the State Comptroller made the statement that there were a great number of

sales of property for taxes to the State which were in error due to the fact that the properties had been double-assessed. He further stated that practically all of these errors showed up after the final settlement with the tax collector, and after the State Comptroller had delivered the certificates of sale to the State Land Commissioner, and asked if he, as State Comptroller, was authorized to cancel such sales from the records of the State Land Commissioner, etc. Without considering whether or not a double assessment of property caused a sale of the same for taxes to be in error or invalid, I merely advised the Comptroller that: "In my opinion, it is immaterial that the tax sales considered in this question were irregular due to double assessments. The same rule as stated in answer to your request number 2 would be applicable to the sales here considered." His request number 2 was whether or not he, as Comptroller, had the authority to set aside sales under the provisions of Section 232 of the 1935 Revenue Act after final settlement had been made with the tax collector, and the certificates of sale had been delivered by him to the State Land Commissioner.

I did not intend to express an opinion therein on the question of whether or not a sale of land for taxes when the same has been double-assessed results in said sale being in error or invalid, and that opinion is not to be so construed.

The other question presented in your letter of inquiry is whether or not the tax assessor can refuse to assess to any person any parcel of property that such person might demand to be assessed to him. I assume from the other assessments in your letter of inquiry that what you have in mind by this question is a situation where one party has already returned the property for assessment and the same has been assessed to him, and at a later date, another party comes in to return the same property for assessment in his name. The duty of the tax assessor in such an event was settled by the Supreme Court of Alabama in the case of **State ex rel. Matson v. Laurendine,** 199 Ala. 312, 74 So. 370, from which I quote in extenso:

> "By this proceeding a resident taxpayer of Mobile county seeks to have the tax assessor of said county required by law to assess to him certain real estate for state and county taxes, a proceeding lacking in direct analogy, so far as the diligence of counsel has been able to disclose. The defense interposed rested upon the proposition that another had previously assessed this property for the same tax year, and the assessor concluded that he was without authority to permit a second assessment, believing the first assessment to have been by the true owner.
>
> "That it is made the duty of the tax assessor to assess for taxation the property of every citizen is, of course, quite clear, as is also the duty of the citizen liable for taxation to return his property for such assessment. * * * *
>
> * * * *
>
> "We find no case which warrants the opinion that the assessor in accepting property for tax assessment has imposed upon him the duty

or can exercise the right to determine for himself the title of such property and the true ownership as between contesting claimants. This is a matter with which he cannot be concerned. The assessment of property by one in possession claiming ownership may prove of evidential value in the event of litigation and thus constitute an important right. Code 1907, Sec. 2830 (Code 1923, Sec. 6069). To deny the petitioner the right to assess his property would be to authorize the tax assessor to pass upon the title to the real estate and himself decide the true ownership. Such an anomalous situation was clearly not contemplated by the legislative department in the establishment of the office of tax assessor. * * * *"

As may be seen from the above quoted excerpt from the opinion of the Supreme Court in that case, the question presented was one of first impression, and my research does not disclose where the rule therein laid down has been overruled or modified. On the authority of that case, you are advised that you must assess property to any person who returns the same for assessment and demands that the same be assessed to him, regardless of the fact that such property may have been previously returned by, and assessed to, another.

There is nothing in Act No. 176, S. 117, approved April 21, 1936, General Acts, 1936, page 205, as variously amended, the so-called Unit System of Assessment Act, applicable at the present time only to Jefferson County, which requires a different conclusion, for the reason that, while under the procedure therein provided for the assessment of real property for taxation in Jefferson County, a person is not required to return his real property for assessment, there is nothing which prevents him from returning it for assessment if he so desires; nor is there anything therein which changes the power, authority or duties of the tax assessor in regard to the instant question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1941.

Hon. J. S. Benson,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Taxation — Redemption — Judge of Probate —

1. When property sold for taxes, and bid in by the State at tax sale, has been redeemed by one claiming the right to redeem, the proper amounts for redemption have been paid by such person, and certificate of redemption has been issued to such person by the Judge of Probate, he is without further authority in the premises.

2. In such an event, if another subsequently claims the right to redeem, and that the person who has redeemed was without such right, this is a controversy between those parties which may be settled in proper proceedings in the courts of this state.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 18, 1940, in which you request my official opinion as follows:

"Please render me an opinion, at your earliest convenience, on the following question:

"On June 17th, 1940, a tract of land was sold for its taxes, and was sold in the name of N. B. Shelton, who was at the time of the sale deceased. On July 10, 1940, a Mrs. Berry came in and made application for redemption, stating that she was a daughter of the decedent and certificate of redemption was issued to her. At a later date a son of the decedent, and previous owner, came in and stated that his sister, Mrs. Berry, did not have any interest in the property, that he, the son, owned all of the property by virtue of having a deed to same. This deed is recorded in this office and is regular.

"Now my question is what must this office do reclaim the certificate of redemption issued to Mrs. Berry, and in turn let redemption be made by Mr. Shelton, and how can Mrs. Berry be reimbursed? This property was bought in by the State.

"Mr. Shelton, the present owner, is pressing me to have this straightened up, and I would appreciate an early opinion."

I assume from your letter of inquiry that the daughter mentioned therein claimed the right to redeem the property in question on the ground that she was an heir of the deceased father; that she paid to you the proper amounts to effect a redemption of the property in question, whereupon you issued a certificate of redemption to her. I assume further that the son, at a later date, came to you, claiming that he was the real owner of the property by virtue of a deed thereto which he received from his father prior to the time of his death, and that by virtue of that fact he was the one entitled to redeem the property, and that the daughter who had previously redeemed the same did not have the right to redeem. You ask my advice in the premises, and what is said hereinafter is based on the above assumption.

The provisions of the statutory law of this state governing the redemption of lands sold for taxes are found in Sections 268-295, Chapter 5, Article VIII, of the 1935 Revenue Act, as certain of those sections have been subsequently amended, but in respects not here material. In construing these provisions and the duties of the Judge of Probate thereunder in regard to

the redemption of lands sold for taxes, this office has held that the duties of the Judge of Probate in regard thereto are ministerial only, and that he is not vested with any judicial authority in regard thereto. See opinions to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, under date of February 1, 1939, Quarterly Report of Attorney General, Volume XIV, page 83; and to Hon. Matt A. Boykin, Judge of Probate, Mobile County, under date of March 20, 1939, Quarterly Report of Attorney General, Volume XIV, page 215. Cf. Opinions to Hon. C. B. Gullatt, Jr., Judge of Probate, Russell County, under date of January 29, 1937, Quarterly Report of Attorney General, Volume VI, page 31; and to Hon. R. K. Greene, Judge of Probate, Hale County, under date of September 3, 1940, Quarterly Report of Attorney General, Volume XX, page 237.

In the instant case, the proper amount required for redemption has been paid, and a certificate of redemption has been issued by you. You are now presented with the question of a dispute between two persons as to which of the two was, as a matter of law, entitled to redeem the property. This presents a judicial question upon which you, under the rule laid down in the opinions hereinabove cited, cannot pass.

The controversy is one between the two individuals involved. Cf. **Hester v. First National Bank of Russellville,** 237 Ala. 307, 186 So. 717. See also opinions to Hon. Eugene H. Hawkins and to Hon. Matt A. Boykin, supra. This controversy may be settled, and the rights of the parties in regard to the property in question may be determined, by proper proceedings in the courts of the state.

You are, therefore, advised that you do not now have any authority or duties in the premises.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1941.

Hon. Coley Page,
Tax Collector,
Jackson County,
Scottsboro, Alabama.

Tax Collector — Tax Receipts —

Section 167 of the Revenue Act of 1935.—

1. Under the provisions of Section 167 of the Revenue Act of 1935, the Tax Collector is required to issue a receipt for taxes in the name of the taxpayer whose name appears on the assessment list delivered to him by the Tax Assessor regardless of who pays the taxes.

2. Tax Collector not authorized to accept payment of taxes on the same property more than once for the tax year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 25, 1940, in which you request my opinion as follows:

"We have an instance in this office upon which we would like your early advice.

"A taxpayer of this county, R. H. Skelton, died intestate in 1939, leaving a son and a widow, step-mother to the son. He owned at the time of his death real estate and personal property in the county. In the fall of 1939, the son came in the Assessor's office and assessed all the real estate and personal property to himself for 1940 taxes. This fall the widow of R. H. Skelton came in this office and had a deed in her possession to the real estate and claimed that it belonged to her and paid the taxes on the real estate, for which we gave her a receipt. The son has since that time come in the office and stated to us that the deed which Mrs. Skelton had was invalid and that the real estate was his and he wanted to pay the taxes on the same and demanded that we issue a receipt to him. He did not offer the money on that day but stated that he would be back and would want a receipt for the 1940 taxes on this real estate. We would like to know what action we should take in this matter. Is it possible for us to issue duplicate receipts on the same assessment? This receipt was transferred to our partial-payment receipt book, because Mrs. Skelton did not want to pay on the personal property."

In answer to your inquiry, I call your attention to Section 167 of Act No. 194, H. 324, approved July 10, 1935, (General Acts, 1935, page 256), which provides:

"Section 167. Upon the payment of taxes and fees and costs, if any, assessed and charged against him by any taxpayer, the collector shall give a receipt therefor from the book mentioned in the next succeeding section showing the name of the taxpayer, the date of the payment, the total assessed value of real and personal property, separately, and stating the amount of the State, county and special taxes separately together with the interest, costs and fees, and such receipt shall be prima facie evidence that such taxpayer has paid all his State and county taxes for that year on the real and personal property, and other subjects of taxation contained in his assessment lists and all fees and costs mentioned in such receipt. Provided when any taxpayer shall pay all the taxes on any parcel of real estate separately assessed the description thereof shall be placed on the receipt."

It will be noted from the foregoing section that the Tax Collector is required to give a receipt for the payment of taxes showing the name of the "taxpayer". The "taxpayer" is of course the person to whom the property is assessed. You state in your inquiry that the stepmother paid the taxes that had been assessed by and to her stepson, R. H. Skelton, and that you issued a receipt to the step-mother. This was improperly done, if the receipt was issued in the name of the stepmother. The Tax Collector should comply with Section 167, supra, in and about issuing receipts.

The Supreme Court of Alabama has held that the State is entitled to only one tax on one subject of taxation, and when so paid the State's lien is discharged. **Pickler v. the State,** 149 Ala. 669, 42 So. 1018. **Laney v. Proctor,** 236 Ala. 318, 182 So. 37.

The payment of taxes by a stranger, a mere volunteer or intermeddler, will divest the lien, and inure to the benefit of the owner, but it cannot be made the foundation of any right or claim to the property on the part of such third person. **61 C. J. 949-950.**

Specifically answering your inquiry, I am of the opinion that if the stepson demands a receipt for the payment of the taxes, you should issue to him a duplicate receipt in his name, showing that the taxes have been paid. You do not have authority under the law to accept payment of taxes twice on the same piece of property, as the first payment of the tax discharges the State's lien.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Filing Tax — Instrument conveying personal property and containing a lien as security for a debt is subject to deed tax as provided by Schedule 46, and a mortgage tax as provided by Schedule 94 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion of January 17, 1941, which follows:

"I am enclosing photostatic copy of contract filed in this office for record. You will note that we collected $20.00 deed tax and $90.00 mortgage tax when same was filed, which was paid under protest. Will you please examine the contract and advise us at your earliest convenience whether or not you think we were correct in collecting this tax."

I have carefully examined the enclosed contract of sale and wish to quote pertinent parts as follows:

"4. Sellers this day sell to Buyers the said 20 shares of the common stock of the said Deaton Truck Lines, Inc., an Alabama corporation, at and for the price of $80,000.00, subject to the following adjustments, and payable as follows, to-wit:

* * *

"(B) Payments: Thirty per cent of the purchase price, adjusted as hereinabove provided is estimated by the parties to be approximately $24,000.00; of which sum $20,000.00 is this day paid in cash by the purchaser to the Sellers, the receipt whereof is hereby acknowledged by the sellers in the aforesaid proportions; and the balance of $4,000.00 is payable January 2nd, 1941, evidenced by a non-negotiable promissory note secured by a collateral deposit of $4,000.00 (at present market value) of United States Government bonds, payable to bearer. The said collateral note, together with the bonds securing the same, shall be deposited with the escrow agent hereinafter referred to, which said agent shall deliver to the said Sellers on January 2nd, 1941 the said bonds, if the promissory note which the said bonds secure is not paid on that date by the Buyers."

"(a) Title to the said stock is hereby vested in the Buyers in the above proportions, and the said stock is pledged by the Buyers to the Sellers as security for the payment of the balance of the purchase money hereinabove specified. When all of the purchase money shall have been paid the said pledge shall be extinguished, and the Buyers shall be entitled to the delivery of the said stock.

"(b) It shall be noted upon the books of Deaton Truck Lines, Inc., that the legal title to the said stock is vested in the said Buyers in the said proportions, subject to the pledge hereinabove set out."

In my opinion, you were correct in collecting on the contract of sale a deed tax of $20.00 on the down payment of $20,000.00 and a mortgage tax of $90.00 on the balance of $60,000.00 to be paid in installments, as provided by Schedules 46 and 94 respectively of the 1935 Revenue Act, (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256). Said schedules provide in part as follows:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property

within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: Upon all such instruments which are executed to convey real or personal property situated in this State of the value of five hundred dollars ($500.00) or less there shall be paid the sum of fifty cents ($0.50), and upon all such instruments executed to convey real or personal property situated in this State of more than five hundred dollars ($500.00) in the value there shall be paid the sum of fifty cents ($0.50) for each five hundred dollars ($500.00) or fraction thereof in value of property conveyed by such instrument. * * *"

"Schedule 94. No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: (a) Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars ($100.00), there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure the indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character. * * *"

This contract comes within the principles as enunciated in the case of **Thompson, Probate Judge, v. Smith,** 27 Ala. App. 460, 174 So. 796, cert. denied 234 Ala. 409, 174 So. 797, in which the Supreme Court said:

"So that we think, when there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known **as a lien is reserved for that purpose,** and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax, as provided in Schedules 94 and 46, supra, respectively." (Emphasis supplied)

See also: Quarterly Reports Attorney General, Vol. XIII, page 109.

In the case of **Rolfe et al. v. Huntsville Lbr. Co.,** 8 Ala. App. 487, 62 So. 537, the Court of Appeals in referring to a pledge said:

"A pledge may be defined to be 'a transfer of personal property as a security for a debt or other obligation' (31 Cyc. 785), or 'a bailment of personal property by a debtor to his creditor, to be kept by him until his debt is discharged' (22 Am. & Eng. Ency. Law, 842). 'The three elements necessary to constitute a contract one of pledge are: (1) pos-

session of the pledged property must pass from the pledgor to the pledgee or to some one for him; (2) the legal title to the pledged property must remain in the pledgor; (3) the pledgee **must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person.**'—31 Cyc. 797. 'The delivery of the possession of the property to the pledgee may be actual, constructive, or symbolical; but it must be clear, unequivocal, complete, and effective at all times so as to give notice to third parties of pledgee's rights.'—31 Cyc. 801." (Emphasis supplied)

See also: 49 C. J. "Pledges", Par. 1, page 896.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation — County Boards of Equalization — Tax Assessors —

Where taxpayer has failed to avail himself of the statutory right to a review of the assessed valuation of his property for taxation fixed by the County Board of Equalization, and the tax year is closed, the assessment is final, and neither the Board of Equalization nor any other authority has power to alter the same, in the absence of fraud or lack of jurisdiction.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of recent date, in which you request my opinion as follows:

"Under the new act creating the Board of Equalization, the Act states that after the adjournment of the Board of Equalization all valuations are final and changes in assessed value can be made only by appealing to the Circuit Court.

"I would like to ask you if there is any way to correct the following error. Mr. Lloyd Caddell, 1908 Mayfair Drive, Homewood, Birmingham, bought a vacant lot from Mr. Paul Smythe and then we get the following letter from the Board of Equalization:

'November 12, 1940.

'Mr. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

'Dear Mr. Johnson:

'IN RE: **Lot 8 Smith's Add to Mayfair** Unit No. 4-2637-8

'With reference to the attached affidavit from Mr. F. E. Butler in which he alleges that the residence on the above described lot, owned and occupied by Mr. Lloyd L. Caddell, was not completed until after October 1, 1939, and, therefore, should not be assessed as a completed building as of that date.

'The appraiser for the Board of Equalization inspected this property as of November 24, 1939, and reported the lot with the improvements as follows: one seven-room frame house with asbestos roof, two tile baths, furnace heat, with garage and basement, and placed for the assessed value — Land, $400.00 Improvements $2600.00. Total $3000.00.

'In view of the fact that the house was not completed until after October 1, we recommend that a letter of credit be given, reducing the assessed value for the tax year 1940 to $1000.00 total, and that the Assessment of $3000.00 apply for the tax year 1941.

'Yours very truly,
'BOARD OF EQUALIZATION,
'J. Paul Meeks,
'Associate Member.

'JPM:LLB'

"We also have the following affidavit:

"AFFIDAVIT

'STATE OF ALABAMA)
)
'JEFFERSON COUNTY)

'Personally appeared before me, the undersigned authority for the within County and State, F. E. Butler, who first being duly sworn, deposes and says that he did build the residence occupied by Lloyd L. Caddell and wife at Lot 8, Smythe's Addition to Mayfair in Homewood, Alabama, and that the permit for the construction for the said house was taken out on September 11, 1939 and that as of October 1, 1939 he had little more than completed the masonry for

the basement which is under the entire house and probably had the house framed as of latter date, and that his estimate of the amount of labor and material used up to October 1, 1939 would probably not have exceeded $600.00. It usually requires some ten weeks to complete the average six-room residence. Mr. Caddell moved into the house on the 18th day of November, 1939 and the house was not entirely completed at that time and our records show that it was several days after the 18th day of November, 1939 before the same was finished.

'Because of these facts the writer had advised Mr. Caddell prior to October 1, 1939 that including his lot he should return his taxes for 1940 at $1000.00, this being the writer's idea of the amount of labor and material that was on the lot at that time.

'F. E. Butler

'Sworn to and subscribed before me this the **15th** day of October 1940.

'Ruby Akerman

'NOTARY PUBLIC'

SEAL

"We have quite a few cases similar to this and as taxes accrue as of October 1st and as the property owner did not know the assessed value had been changed until he got his tax notice. He failed to protest. The error as you can plainly see was made by the Board of Equalization in that they appraised on Nov. 24, 1939, when as a matter of fact the house was only partially constructed on the date of October 1st when taxes accrue.

"It is unfair to the taxpayer when an error has been made any department of the State, County or City Government not to correct the error.

"The above is plainly in the estimate of this writer an error that should be corrected without having to resort to the courts."

The method for the assessment and collection of taxes is governed generally in Jefferson County by the provisions of Act No. 176, S. 117, approved April 21, 1936, General Acts, 1936, page 205, the so-called Unit System of Assessment Act, applicable at the present time only to Jefferson County, as said Act has been variously amended.

The method for determining the assessed value of property for taxation is found in Act No. 143, S. 14, approved March 15, 1939, General Acts, 1939, page 178, which act created a County Board of Equalization in each of the counties of the State, in lieu of the old County Boards of Review, and pro-

vided the power, rights, authority and duties of said boards. This office in an opinion appearing in Quarterly Report of Attorney General, Volume XIX, page 247, held that said act was applicable in Jefferson County in all respects other than as the same was amended pro tanto by Act No. 532, H. 871, approved September 22, 1939, General Acts, 1939, page 830, which said act amended Sections 4, 5 and 6 of Act No. 175, supra.

I have carefully examined the provisions of Act No. 176, supra, as variously amended, and the provisions of Act No. 143, supra, and from aught that appears from your letter of inquiry, all the statutory requirements of said acts were compiled with by the Board of Equalization in fixing the assessed valuation of the property in question. As I read your letter of inquiry, the taxpayer was notified in the manner required by statute of the assessed valuation placed upon his property by the Board of Equalization, but neglected to file any protest or objection thereto in the manner, and within the time, provided by statute, and no question of fraud or lack of jurisdiction is presented.

This being true, and the tax year now being closed, the assessment has become final, and neither the Board of Equalization nor any authority now has the power to reduce the assessed valuation placed upon this property. **Daffin v. Scotch Lumber Co.,** 226 Ala. 33, 145 So. 452; Quarterly Report of Attorney General, Volume II, page 51; Quarterly Report of Attorney General, Volume XIII, page 111; Quarterly Report of Attorney General, Volume XIV, page 92; Quarterly Report of Attorney General, Volume XIX, page 250. See also Opinion to Hon. Festus M. Shamblin, Tax Assessor, Tuscaloosa County, Tuscaloosa, Alabama, under date of December 23, 1940, a copy of which is enclosed.

While this may seem to be a harsh rule as applied to the instant taxpayer, the situation in which he now finds himself, as I read the facts detailed in your letter of inquiry, is a result of his failure to avail himself of his statutory rights, rather than as a result of the inadequacy of the statutes in regard thereto.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 28, 1941.

Hon. Howard Kirby, Clerk,
Circuit Court, Etowah County,
Gadsden, Alabama.

Judgment against plaintiff for costs —

Where execution has been issued against the defendant and returned no property found, and execution in turn has been issued against the plaintiff for costs accumulating at his instance and re-

turned no property found, no certificate of judgment can be recorded under Section 7874, Code of Alabama, 1923, for the reason no judgment exists against the plaintiff for costs.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 20, 1941, in which you request my official opinion as follows:

"Please render to me your opinion on the following matter.

"For example: 'A' obtains judgment against 'B' for a certain sum and Execution is issued to the Sheriff and return is made 'No Property Found' and then Execution is issued against 'A' the Plaintiff for the amount of costs created by him and it is also returned 'No Property Found.'

"The question is, Can I legally issue a certificate of Judgment against said plaintiff and have same recorded in the Probate Office on Judgment record?"

My answer to the above is in the negative. You cannot have a certificate of judgment issued against the plaintiff. There is no judgment against him for costs or anything else. I call your attention to Section 7874, Code of Alabama, 1928 (Michie) which is as follows:

"Section 7874. **Judgments and decrees may be registered.** — The owner of any judgment or decree rendered in any court of record of this state, or of the United States, held in this state, may file in the office of the judge of probate of any county of this state, a certificate of the clerk or register of the court by which the judgment or decree was rendered which certificate shall show the style of the court which rendered the decree or judgment, the amount and date thereof, the amount of costs, the names of all parties thereto and the names of the plaintiff's or complainant's attorney, and shall be registered by the judge of probate in a book to be kept by him for that purpose, which said register shall also show the date of the filing of the judgment or decree, and said judge shall make a proper index to said book, which shall also show under the proper letter or letters of the alphabet the names of each and every defendant to said judgment or decree."

The above section must be strictly construed and its mandates followed. **Duncan v. Autauga Banking and Trust Co.**, 223 Ala. 434, 136 So. 733.

I am aware that Section 7805, Code of Alabama, 1923, provides that where execution is returned against the defendant "no property found" then execution may issue in the name of the clerk or register of the court against

the plaintiff for all the costs created by him in obtaining his judgment. But this execution in favor of the officers is not, in fact, based on any judgment but is simply a courtesy or remedial right conferred by statute. No lien obtains in favor of the clerk or register under this statute as against the property of the plaintiff until execution has actually been issued and placed in the hands of the sheriff. **Bain v. Lusk and Son,** 21 Ala. App. 442, 109 So. 187; **Hulett v. Hood,** 109 Ala. 345, 19 So. 419.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 23, 1941.

Hon. Frank Pearce,
Tax Assessor,
Marion County,
Hamilton, Alabama.

Taxation — Tax Assessors — Assessments — Owner Unknown —

Where party owned lands or property and assessed same in 1939, and upon demand by the tax assessor to return the same for assessment in 1940, makes known to the tax assessor that he has conveyed the said lands or property to others, whose names he does not know, and the tax assessor, in the course of diligent inquiry to ascertain the name or names of the owner or owners of said lands or property, examines the deed records in the office of the judge of probate without ascertaining the name or names of the owner or owners of the same, and is unable to ascertain the same from any other source, the assessment should be made to "owner unknown."

Opinion by Assistant Atttorney General McQueen.

Dear Sir:

Your request for official opinion of November 2, 1940, is as follows:

"Reference is made to your opinion on the 'owners Unknown' lands in which you stated that an examination of the records in the Judge of Probate for the ownership of property to be assessed under 'Owners Unknown.'

"In a case where the taxpayer owned several hundred acres of lands in 1939 and when the 1940 assessment was due to be made, he had sold all of the lands to other parties. When the assessment was not made by this party I wrote him, requesting the assessment for 1940. He replied that he had sold all the lands that was assessed against him for 1939 and did not know to whom. I made a dilligent search in the Probate Judge's office for a record of the deed or deeds and nothing was

found. Please advise me in a case like mentioned above, to whom should the assessment be made.

Section 53 of the 1935 Revenue Act reads in pertinent part as follows:

> "No lands shall be returned to 'owner unknown' until the Assessor shall have made a demand upon the person, if resident of the county, or by registered mail, if non-resident, whose address is known, to whom such lands or property was last assessed, and the said assessor shall make a diligent inquiry to ascertain the name of the owner of said lands or property."

It is true that in the opinions of this office rendered to the State Comptroller under date of August 26, 1940, Quarterly Report of Attorney General, Volume XX, page 177, and under date of October 28, 1940 (copy enclosed), I held that the tax assessor, in making diligent inquiry to ascertain the name of the owner of the lands or property, before assessing the same to "owner unknown", should first examine the deed records in the office of the judge of probate, in an effort to ascertain the true and lawful owner of such lands or property. However, nothing in either of these opinions should be construed to mean that the deed records in the office of the judge of probate are controlling in regard to whom property should be assessed.

In the instant case, it appears that you have complied with the above quoted excerpt from Section 53, supra. First, you have made demand upon the person to whom the lands or property were last assessed, and, in response to that demand, such person has notified you that he has since conveyed title to all of such lands or property to others, whose names are not presently known to him. Thereupon, you have, in the course of a diligent inquiry to ascertain the name or names of the owner or owners of said lands or property, examined the deed records in the office of the judge of probate to see if there appears of record an owner or owners of said lands or property other than the person to whom the same was last assessed, who has conveyed his title to the same to others, and no such owner or owners appear of record. If such other diligent inquiry in an effort to ascertain the name or names of the owner or owners of said lands or property which you are able to make does not reveal the owner or owners of the same, then you would be justified in assessing such lands or property to "owner unknown." The tax assessor is not required to go beyond the records in the office of the judge of probate and investigate secret conveyances or secret transactions in order to ascertain the true and lawful owner of lands or property. See 61 C. J. 629 and cases cited therein.

Of course, in such a case, if by diligent inquiry you do ascertain the name or names of the owner or owners of said lands or property, the assessment should be in the name or names of such owner or owners, even though they do not appear as such owners according to the records in the office of the judge of probate.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1941.

Hon. J. Bruce Henderson, Senator,
Wilcox County,
Millers Ferry, Alabama.

Counties — Officers — Statutes —County Road Engineer of Wilcox County —

1. It is mandatory that the Court of County Commissioners of Wilcox County elect a County Road Engineer. Act No. 437, S. 399, approved September 13, 1939, (Local Acts, 1939, p. 270).

2. In the event a vacancy occurs in such office or position for any reason, it is mandatory that the Court of County Commissioners of Wilcox County elect someone to fill such vacancy. Act No. 437, supra.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion, bearing date of January 28, 1941, is as follows:

"Act No. 437, S. 399, approved September 13, 1939, Local Acts, 1939, page 270, provides for the creation of the office of County Engineer or County Road Engineer of Wilcox County, Alabama, etc. I shall thank you to refer to that act, and especially to Sections 1 and 6 thereof, and advise me on the following questions:

"1. Is it mandatory for the Court of County Commissioners of Wilcox County to elect or select a County Engineer or a County Road Engineer?

"2. If the answer to the first question is in the affirmative and a County Engineer or County Roard Engineer is elected or selected by the Court of County Commissioners, and a vacancy should subsequently occur in such office or position for any reason, would it be mandatory for the Court of County Commissioners to elect or select someone to fill the vacancy in said office or position?"

The Act providing for the creation of the office or position of County Road Engineer of Wilcox County, Alabama, is cited in your letter of inquiry. By Section 10 thereof it became effective on the first Monday after the second Tuesday in January, 1941.

Sections 1, 6 and 7 thereof read, respectively, as follows:

"Section 1. OFFICE OF COUNTY ROAD ENGINEER CREATED: **That the office of County Road Engineer for Wilcox County is hereby created.** That said County Road Engineer shall receive a salary to be

fixed by the Court of County Commissioners at not less than $1800.00 (Eighteen hundred dollars) nor more than $3000.00 (Three thousand dollars) per annum payable in equal monthly installments out of the proceeds of the State Excise Tax on gasoline allocated to Wilcox County. **That said County Road Engineer shall be the agent of the Court of County Commissioners in directing the construction, maintenance, control and use of county roads, highways and bridges.**" (Emphasis supplied)

"Section 6. ELECTION OF COUNTY ROAD ENGINEER: **The said County Road Engineer shall be elected to this office by the Court of County Commissioners from a nomination made by the State Highway Director.** If such nomination is not acceptable to the said Court of County Commissioners the State Highway Director shall be requested to make additional nominations. If the State Highway Director refuses to make the nomination the court may fill the position of County Road Engineer with any person that has the qualifications herein set out." (Emphasis supplied)

"Section 7. COURT OF COUNTY COMMISSIONERS TO HAVE POWER TO PRESCRIBE DUTIES AND REMOVE: The Court of County Commissioners is authorized and directed to prescribe the duties of the County Road Engineer **and is empowered to dismiss him at will.**" (Emphasis supplied)

Whether or not it is mandatory for the Court of County Commissioners to elect or select a County Road Engineer under the provisions of said Act depends upon whether or not the word "shall" used in Section 6, supra, is mandatory and imperative, or permissive merely. In this connection I quote as follows from 57 C. J. 547-550:

"3. Expressing Mandate Either Peremptory or Permissive. — a. In General. **As used in constitutional, contractual, statutory, and testamentary provisions, it depends upon the intention, as to whether or not the word should be construed to be mandatory or directory, and its construction is controlled by the object sought to be reached, or by the subject matter and context.**

"b. Imperative of Mandatory— (1) In General. **In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative, or mandatory.** It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; **but the context ought to be very strongly persuasive before it is softened into a mere permission.** (Emphasis supplied)

When the subject sought to be reached by said Act, that is, the creation of a County Road Engineer for Wilcox County, and the subject matter and context of the Act are considered, it seems very clear that it was the intention of the legislature that the word "shall" in Section 6, supra, be construed as mandatory and imperative, rather than permissive merely. That such was the intention of the legislature is even more certain when Sections 11, 12 and 14 of Act No. 436, S. 397, approved September 13, 1939, and effective on the first Monday after the second Tuesday in January, 1941, (Local Acts, 1939, page 261), dealing with the Court of County Commissioners of Wilcox County, are considered. Said sections, respectively, contain provisions in regard to the duties of the County Road Engineer in connection with purchases, sales and pre-auditing and payment of bills by the County.

The premises considered, it is my opinion that it is mandatory, under the provisions of Act 437, supra, for the Court of County Commissioners of Wilcox County to elect a County Road Engineer in the manner therein provided.

Before answering your second question, it is necessary to first determine who is invested with the power to fill a vacancy in the office or position of County Roard Engineer of Wilcox County. The Act is completely silent in this regard. If the office or position of County Road Engineer were an office with a fixed term, then a vacancy would be filled by the Governor, under the provisions of Sections 2584-2585 of the Code of Alabama, 1923. However, it is not necessary to even determine whether or not the County Road Engineer of Wilcox County holds an office or merely a position of employment, since in either event he has no fixed term, but rather serves at the pleasure of the Court of County Commissioners. See Section 7, supra. Consequently Sections 2584-2585, supra, could not be applicable. See **State ex rel Little et al vs. Foster,** 130 Ala. 154, 30 So. 477; and **Clark vs. State ex rel Graves,** 177 Ala. 188, 59 So. 259.

Since there is no express constitutional or statutory provision for the filling of such a vacancy, it is my opinion that it would be filled by the Court of County Commissioners of Wilcox County in the same manner that the original appointment is made, since the Court of Commissioners of Wilcox County is invested with the power of electing the County Road Engineer. This is the general rule, as stated in 46 C. J. 975 in the following language: "In the absence of any constitutional or statutory provision, the power to appoint to office is to be regarded as including the power to fill vacancies." Cf. State ex rel Little et al vs. Foster, supra.

Since the power to fill a vacancy in a position for County Road Engineer of Wilcox County is vested in the Court of County Commissioners of Wilcox County by virtue of the fact that it is the appointing power for such office or position, it follows that it is mandatory that the Court of County Commissioners fill a vacancy in such office or position which might occur for any cause. This for the reasons set out in my answer to your first inquiry.

Any other construction of this Act would put it in the power of those whose duty it is to execute same, that is, the Court of County Commissioners

of Wilcox County, not only to evade it, but to practically destroy it. Such could not have been within the contemplation of the legislature. Cf. State ex rel Little et al vs. Foster, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1941.

Hon. T. R. Snead,
Judge of Probate,
Cherokee County,
Centre, Alabama.

Counties — Gasoline Tax Warrants — Use of Proceeds of —

1. Where county issues and sells gasoline tax warrants for the purpose of securing funds with which to pay county's contribution under contract with the State for the improvement of public roads in the county, and the proceeds of such warrants are in excess of the amount necessary to pay such contribution, such excess may, pursuant to proper resolution of the county governing body, be used for the purpose of paying expenses incurred, or to be incurred, in the construction, improvement, maintenance, and repair of public roads and bridges in the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion, bearing date of December 3, 1940, is as follows:

"Recently the Board of Revenue of Cherokee County passed a resolution authorizing the issuance and sale of $75,000 of warrants against the gasoline tax of this County.

"These warrants were issued and sold for the purpose of paying the County's part of the road building contract with the State, said contract having been entered into between the State and County sometime prior to the date of the issuance and sale of these warrants.

"The monies derived from the sale of these warrants are on deposit in 'State Gasoline Tax Revenue Warrant Fund No. 2', as is provided in paragraph (11) of the resolution authorizing the issuance and sale of said warrants, and which paragraph is in words and figures as follows: 'The warrants shall be sold and the proceeds received by

the county from the sale thereof shall be kept separate and apart from all other moneys of the county, and the proceeds received from the sale thereof shall be used solely for payment of the contribution to the state as is set out in paragraph (a) of the preambles hereto'.

"All local road and bridge operations are paid by the Board of Revenue out of the 'Special Local Road Fund'. The Board of Revenue now insists upon transferring a part of the funds derived from the sale of these warrants out of the 'State Gasoline Tax Revenue Warrants Fund No. 2' into the 'Special Local Road Fund' to be used as are the other monies in this fund.

"In order that you might fully understand this matter I am herewith enclosing you the entire file and when you have finished with the same will thank you to return to me, together with an opinion advising whether or not the Board of Revenue has authority to transfer these funds or any portion thereof into the Special Local Road Fund as herein above outlined."

In addition to the copy of the resolution of the Board of Revenue of Cherokee County under date of October 30, 1940, authorizing the issuance and sale of the gasoline tax warrants referred to in your letter of inquiry, I also have before me a copy of a resolution of said body adopted under date of December 9, 1940, for the purpose of effecting the transfer of the monies referred to in your letter of inquiry.

At the outset, I call your attention to the fact that under paragraph (11) of the resolution of the Board of Revenue of Cherokee County under date of October 30, 1940, which is quoted in your letter of inquiry, the monies here in question should not be in the fund known as the "State Gasoline Tax Revenue Warrant Fund No. 2", which is the special fund established by paragraph (4) of said resolution for the purpose of providing for the payment of the principal and interest on said warrants. Rather, these monies should be kept separate and apart from all other monies of the county in accordance with the provisions of paragraph (11) of said resolution, unless and until the Board of Revenue of Cherokee County, by proper resolution legally adopted, has provided otherwise.

From these two resolutions it appears: The Board of Revenue of Cherokee County authorized the issuance and sale of $75,000.00 worth of gasoline tax warrants, not general obligations of the county, the principal and interest thereon to be paid solely out of a portion of the monies to be received by Cherokee County as its share of the State excise tax on gasoline, etc., said warrants to be retired over a period of not more than five years, and less than one-third of the amount which it is estimated Cherokee County will receive as its portion of the State excise tax on gasoline, etc., being pledged to the payment of the principal and interest thereon. Said warrants were issued for the purpose of securing funds with which to pay Cherokee County's contribution under a contract which it had entered into with the State of Alabama for the improvement of certain public roads in Cherokee County. Said warrants were issued and sold and the proceeds thereof

amounted to $73,688.50. Subsequently, it developed that only $60,000.00 was necessary to pay the county's contribution under its contract with the State of Alabama hereinabove referred to, leaving a balance from the proceeds of said warrants in the amount of $13,688.50. Thereupon, the Board of Revenue of Cherokee County authorized, ordered, or directed the transfer of said $13,688.50 to the special fund of the county from which all current public road and bridge operations of the county are paid, to be used, as the other monies in said fund, for the purpose of defraying expenses which have been, or which may be, incurred by Cherokee County in the construction, maintenance, improvement and repair of public roads and bridges in Cherokee County.

The sole question before me for the consideration is the validity of the transfer of such funds.

The power and authority of the various counties of the State to hypothecate the funds to be received by them as their share of the State excise tax on gasoline, etc., for road and bridge purposes, subject to certain limitations as to time (10 or 20 years depending upon the class in which the county falls) and as to amount (not more than one-third for the purpose of paying obligations previously incurred for road and bridge purposes) has been upheld by the Supreme Court of Alabama in several recent decisions. See **In re Opinions of the Justices,** 230 Ala. 673, So. 105; **Lyon v. Shelby County,** 235 Ala. 69, 177 So. 306; **Herbert v. Perry,** 235 Ala. 71, 177 So. 561; **Isbell v. Shelby County,** 235 Ala. 571, 180 So. 567; **Burleson v. Court of County Commissioners of Marion County,** 235 Ala. 576, 180 So. 572.

On the basis of those decisions, this office has held that a county, subject to the limitations as to time and amount hereinabove referred to, may issue gasoline tax warrants, not general obligations of the county, for the purpose of paying indebtedness previously incurred, or to be incurred, in the construction, maintenance, improvement and repair of public roads and bridges. See opinions to Hon. J. C. Grady, Judge of Probate, Chambers County, LaFayette, Alabama, under date of February 1, 1939, (Quarterly Report of Attorney General, Volume XIV, page 89); to Hon. C. E. Carmichael, Judge of Probate, Colbert County, Tuscumbia, Alabama, under date of May 8, 1939, (Quarterly Report of Attorney General, Volume XV, page 93); to Hon. B. G. Robison, Judge of Probate, Pickens County, Carrollton, Alabama, under date of November 9, 1939, (Quarterly Report of Attorney General, Volume XVII, page 202); to Hon. W. L. Pratt, Judge of Probate, Bibb County, Centreville, Alabama, under date of July 12, 1940, (Quarterly Report of Attorney General, Volume XX, page 49).

From the above, it appears that the Board of Revenue of Cherokee County could have originally issued the entire amount of gasoline tax warrants which it did issue for the purpose of using the proceeds to defray expenses previously incurred, or to be incurred, in the construction, maintenance, improvement, and repair of public roads and bridges in Cherokee County, Consequently, since there is now a balance from the proceeds of the gasoline tax warrants which have been issued and sold over and above the amount necessary to pay Cherokee County's contribution under its contract with the State of Alabama hereinabove referred to (the purpose of the is-

sue), in my opinion, there is no legal barrier to prevent the Board of Revenue of Cherokee County from now transferring this balance to the special fund of the county from which all public road and bridge operations of the county are paid, to be used for the purpose of defraying expenses which have been, or which may be, incurred by Cherokee County in the construction, maintenance, improvement, and repair of public roads and bridges in the county. Therefore, the resolution of the Board of Revenue of Cherokee County under date of December 9th, 1940, hereinabove referred to, is valid, and said $13,688.50 may be transferred and expended in accordance therewith. See opinion to Hon. W. L. Pratt, supra.

I am returning to you the file in regard to this matter which you furnished me, and am returning to the other members of the Board of Revenue of Cherokee County the copy of the resolution of said board under the date of December 9, 1940 which was furnished me by them.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1941.

Hon. M. T. Maxwell, Secretary,
Board of Revenue, Tuscaloosa County,
Tuscaloosa, Alabama.

Officers — Employees — Employment — Constitution — Counties — Tuscaloosa County.

1. Person employed under authority of enabling Local Acts (Tuscaloosa County) to Constitutional Amendments (Tuscaloosa and Calhoun Counties) held **employees** and not **officers.**

2. A clerk already employed may not perform clerical services after office hours and be paid for such services out of the Contingency Fund created by 1936 Local Acts, page 39, when such clerical services are within the scope of his employment.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of December 28, 1940, in which you request my opinion as follows:

"In regard to an Act (H. 192 Dominick approved March 31, 1936), we desire to ask the following:

"Could a clerk already employed perform clerical services after his official hours and be paid for such services out of this $1200.00 contingency fund referred to?"

In considering your request a brief resume of legislation involved is requisite. In 1935, by Act No. 549, H. 967, passed by the House of Representatives on September 13, 1935, and by the Senate on September 13, 1935 (General Acts, 1935, page 1170), as Constitutional amendment was submitted and subsequently ratified, which is as follows:

"The Legislature of Alabama may hereafter, from time to time, by general or local laws, fix, regulate and alter the fees, commissions, allowances and salaries, including the method or basis of their compensation, to be charged or received by the Tax Assessors, Tax Collectors, Probate Judges, Circuit Clerks, Sheriffs, and Registers of the Chancery Courts, and including the right to place any one or all of said officers on a salary and provide for the fees charged and collected by said officers to be paid into the treasury from which his salary is paid, and provide the method and basis of their compensation, or consolidate any of said offices in the following named counties: Calhoun and Tuscaloosa. All Acts of the Regular Session of the Legislature, 1935 heretofore passed and applicable, or purporting to be applicable, to any or all of said counties, and fixing, or purporting to fix the compensation of said named county officers, on a salary basis, are hereby validated and confirmed."

This amendment validated and confirmed Act No. 128, H. 524, approved June 12, 1935, (Local Acts, 1935, p. 61), regulating the office of the Tax Assessor, and Act No. 129, H. 525, approved June 12, 1935, (Local Acts, 1935, p. 62) regulating the office of Judge of Probate; and Act No. 130, H. 526, approved June 12, 1935, (Local acts, 1935, P. 624), regulating the office of the Tax Collector, all being Local Acts applicable to Tuscaloosa County.

In 1936, in furtherance of the authority vested in it by the Constitutional Amendment, supra, the Legislature passed Act No. 73, H. 190, approved March 31, 1936, (Local Acts, 1936, p. 41), regulating the office of the Clerk of the Circuit Court of Tuscaloosa County.

Act No. 129, supra, Section 3 thereof, was amended in 1936 by Act No. 72, H. 191, approved March 31, 1936, (Local Acts, 1936, p. 40), and again in 1939 by Act No. 96, H. 248, approved March 6, 1939, (Local Acts, 1939, p. 55).

Act No. 73, supra, Section 3 thereof, was amended in 1939 by Act No. 98, H. 250, approved March 6, 1939, (Local Acts, 1939, p. 57). Act No. 130, supra, Section 3 thereof, was amended in 1939 by Act No. 214, H. 302, approved August 11, 1939, (Local Acts, 1939, p. 118). Act No. 128, supra, Section 3 thereof, was amended in 1939 by Act No. 215, H. 303, approved August 11, 1939 (Local Acts, 1939, p. 119).

The purpose and effect of this train of legislation was to abolish the fee system in Tuscaloosa County with respect to the officers so regulated, and to place the officers and the employees thereof on a salary basis.

The purpose of the Constitutional Amendment, supra, was to relieve the Legislature of the rigidities and restrictions imposed by Sections 68, 96, 104 sub-Section 24, and 281 of the Constitution in their applicability to certain named officers of Tuscaloosa and Calhoun Counties. There can be no doubt that the effect of said amendment was to make applicable Sections 69, 96, 104 Sub-Section 24, and 281 of the Constitution of 1901 to those **officers.**

Hawkins vs. Jefferson County, 233 Ala. 49, 169 So. 720;

Tuscaloosa County vs. Shamblin, 233 Ala. 6, 169 So. 234;

Waldrop vs. Henry, 207 Ala. 128, 92, So. 425;

Henry vs. State, 218 Ala. 71, 117 So. 626;

Sloss-Sheffield Steel & Iron Co. vs. Brooks, 19 Ala. App. 107, 96 So. 81, Cert. Den. 209 Ala. 264, 96 So. 83.

The question now necessarily arises as to whether a person whose employment is authorized under the above cited Acts is an **"officer"** within the contemplation of the Constitutional sections referred to supra.

It is my opinion that such a person is not an **"officer"** within the meaning of Sections 68, 96, 104 - 24, and 281 of the Constitution of Alabama of 1901. In the case of **Harrington vs. State ex rel Van Hayes,** 200 Ala. 480, 76 So. 422, Mr. Justice Bouldin, delivering the opinion of the Court, said:

> "A public office is, of course, a public employment; but every public employment is not a public office. The portion of the sovereign power thus delegated to the officer may belong to any of the three governmental departments; that is, legislative, executive, or judicial. A public agent or employe, of course, acts for his principal or employer. A public employment may be created by law, or by contract; but a public office can never be created by contract. Public officers are usually required to take an oath, and often, to make bond, and to keep an office or place of business; but none or all of these requirements do not absolutely determine whether or not a given employment is a public office, within the meaning of a given statute or constitutional provision."

Cf. Opinion of the Attorney General, under date of August 21, 1939, to Hon. W. S. Welch, Chairman of Judiciary Committee, State Capitol, Quarterly Reports, Vol. XVI, p. 182.

Sections "3" of the above cited Acts as amended, or otherwise, conform generally in pertinent part to the language of Section 3 of Act No. 128, as amended, supra, which is as follows:

> "Section 3. The Board of Revenue, or like governing body, of Tuscaloosa County, Alabama, is required, authorized and empowered to pro-

vide sufficient equipment, clerks, deputies and other assistants to the said Tax Assessor, but the said Tax Assessor shall select such clerks, deputies and assistants and shall fix their compensation, but the combined salaries or compensation of said clerks, deputies and assistants selected by him shall not exceed Forty Four Hundred and No/100 ($4,400.00) Dollars, per annum. The said Tax Assessor shall have the right to discharge the said clerks, deputies, and assistants at will, as they shall serve only at his pleasure. The salaries or compensation of said clerks, deputies and assistants shall be paid in equal monthly installments out of the general funds of Tuscaloosa County, upon separate warrants drawn in the same manner as other employees of Tuscaloosa County are paid. * * * "

The employment provided for under Section 3, supra, and comparable sections of the Acts cited supra, is one terminable at will of either party and comes within the rule laid down in **Cobbs vs. Home Insurance Co.,** 18 Ala. App. 206, 91 So. 627, Cert. Den. 207 Ala. 712, 91 So. 922, in which it was held that:

"Since the contract for service of members of the fire department of a city is not for a fixed term, but is terminable at the will of either party, the salary or wage may be changed at any time either by law or by mutual consent, without violating Const. 1901, Sec. 68, prohibiting extra fee or allowance after the services shall have been rendered or contract made."

Also see Biennial Reports, Attorney General, 1936-38, p. 223.

It is my opinion that the employment in question may be changed by law or mutual consent without violating Section 68 of the Constitution.

In 1936 the Legislature passed Act No. 71, H. 192, approved March 31, 1936, (Local Acts, 1936, p. 39), which in pertinent part is as follows:

"Section 1: The Board of Revenue or like governing body of Tuscaloosa County, Alabama, is hereby authorized and empowered to create and set up, out of the general funds of said County, a contingent fund of not to exceed One Thousand Two Hundred Dollars ($1,200.00) per annum, for the purpose of employing additional clerical help and assistance, and for paying taxes, fees or other items charged to or claims made against the Circuit Clerk, Tax Assessor, Tax Collector and Probate Judge or any of them by State or County Auditors or Examiners of Public Accounts.

"Section 2. Payments from said funds shall be made upon warrants drawn in the same manner as employees and accounts of Tuscaloosa County are paid, provided, however, that before any of said officers are allowed additional clerical help and assistance, and before any taxes, fees or other items or claims charged against said officers are paid, satisfactory proof justifying the allowance and payment thereof

must be made and presented to said Board of Revenue or like governing body, and it is entirely within their discretion as to the disbursing of said funds for said purposes, but said payments shall not, in any event, exceed the sum of One Thousand Two Hundred Dollars ($1,200.00) per annum."

The question now presented, as I understand it, is whether an employee whose employment is authorized under the above cited Acts may perform clerical services after his office hours and be paid for such services out of the Contingency Fund created under Section 1 of Act No. 71, supra.

Section 1 of the above Act provides "a contingent fund of not to exceed One Thousand Two Hundred Dollars ($1,200.00) per annum, for the purpose of employing additional clerical help and assistance * * * to * * * the Circuit Clerk, Tax Assessor, Tax Collector, and Probate Judge * * *."

The evident purpose and intent of the Act was to create a contingent fund "for the purpose of employing additional clerical help and assistance" and, in my opinion, it was the intention of the Legislature that "additional help and assistance" should not be construed to effect an increase of compensation of an employee for the performance of duties within the scope of his original employment.

It is, therefore, my opinion that an employee, regularly employed in the performance of clerical services, cannot be paid for services performed after his official hours when such duties are within the scope of his original employment, out of the contingent fund created by Act No. 71, supra. The language of Act No. 71, supra, is not broad enough to admit of any other construction.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1941.

Mrs. Rubye R. McWilliams,
Tax Collector, Wilcox County,
Camden, Alabama.

Elections — Poll Tax —

A person becoming twenty-one years of age on October 1 held not liable for poll tax due on that day.

Opinion by Assistant Attorney General Garrett.

Dear Madam:

Your letter of January 25, 1941, addressed to the Attorney General, has been referred to me for attention and reply.

You first ask whether or not citizens who have registered for the various departments of the Army will be exempt from paying poll tax, and state that a young man has an honorable discharge from the United States Marine Corps, dated August 4, 1939, for disability, and specifically ask if he is entitled to poll tax exemption.

This question was recently considered by this office in an opinion to Hon. Joe Patton, Tax Collector, Sumter County, Livingston, Alabama, under date of January 14, 1941 (copy enclosed), which held:

> "1. Persons who are drafted into, or voluntarily enter, the military or naval service of the United States held not entitled to exemption from payment of poll tax.
>
> "2. Persons who were active officers or enlisted members of the Alabama National Guard or Naval Militia at the time of their induction into the active military or naval service of the United States held entitled to exemption from payment of poll tax during period of such service."

You can see from a reading of this opinion that persons who are drafted into, or voluntarily enter, the military or naval service of the United States, are not entitled to exemption from the payment of poll tax. Likewise, it can be seen that a person who served in the Marine Corps and was honorably discharged therefrom is not entitled to exemption from the payment of poll tax, unless he honorably served therein between January 1, 1917 and November 11, 1918.

You then inquire as to whether or not a person who becomes twenty-one years of age on October 1 is liable for poll tax due on that date. At the outset, your attention is called to the fact that in order for a person to become twenty-one years of age on October 1, he must have been born on October 2, as a person's age changes on the day preceding the anniversary of his birth. See opinion to Mrs. E. J. Garrison, Chairman, Clay County Board of Registrars, Ashland, under date of January 10, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 31 (copy enclosed), and authorities therein cited.

While my research does not disclose that the Supreme Court of Alabama has ever spoken directly to the question of whether or not a person who becomes twenty-one years of age on October 1 is liable for poll tax due on that day, the Court has spoken to the question of whether or not a person who becomes forty-five years of age on October 1 is liable for poll tax due on that date, and I think that the rule laid down by the Supreme Court in that regard is the rule to be used in determining the answer to the instant question. The Supreme Court considered the question of whether

or not a person becoming forty-five years of age on October 1 was liable for poll tax on that date on four different occasions, in the cases of **Frost v. State,** 153 Ala. 654, 45 So. 203; **Finkles v. Farish,** 160 Ala. 230, 49 So. 366; **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57; and **Graves v. Eubank,** 205 Ala. 174, 87 So. 587, and finally reached the conclusion that such a person, i. e., a person becoming forty-five years of age on October 1 was not liable for poll tax due on that date. I quote from the opinion in the last cited case as follows:

> "Under the law as applicable, Frost was 45 years of age October 1, 1906, the day the tax fell due, and if the Constitution exempted those over 45, he would have been liable; but upon a closer analysis of section 194 of the Constitution, we are of the opinion that it is the fixation of a tax on certain ones and not an exemption. In other words, it places a tax on those 'over age of 21 years and under 45 years of age.' Frost on October 1, 1906, was 45 years of age and not 'under the age of 45' as fixed by the Constitution. We therefore expressly overrule said case of Frost v. State, 153 Ala. 654, 45 South, 203."

Since, under the rule laid down in that case, Section 194 of the Constitution fixes a poll tax on all persons "over the age of twenty-one years and under the age of forty-five years," other than those exempted by law, the controlling factor in the instant case is whether or not a person who becomes twenty-one years of age on October 1 is "over the age of twenty-one years" on that date. However, since, as held by the Supreme Court in the case of **Graves v. Eubank,** supra, a person who becomes forty-five years of age on October 1 is not "under the age of forty-five years" on that date, and is, therefore, not liable for poll tax due on that date, it is equally true that a person who becomes twenty-one years of age on October 1 is not "over the age of twenty-one years" on said date, and, consequently, is not liable for poll tax due on that date. Cf. Opinion to Hon. H. A. Baggett, Tax Collector, Monroe County, Monroeville, Alabama, under date of January 11, 1932, Office Edition, Vol. VIII, page 82.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1941.

Hon. Edward L. Colebeck,
Executive Officer,
Board of Education, Hale County,
Greensboro, Alabama.

Elections — Consolidation of School Districts — Poll Lists —

Where an election is held under Section 275 of the Alabama School Code of 1927, looking to a consolidation of districts, and submitting the question of whether a special tax shall be levied in such

new district, the expense of preparing poll lists may be paid by the Court of County Commissioners or other Governing Body. Alabama School Code of 1927, Section 278.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion, bearing date of January 24, 1941, is as folllows:

"Permit me to advise that the Hale County Board of Education requested the Hale County Court of Commissioners on September 17, 1940 to order an election to be held on the 26th day of November, 1940, to determine whether or not School Districts Nos. 21 and 26 in Hale County should be consolidated into one School District to be known as New School District No. 26; and whether or not a special tax of thirty (30) cents on each one hundred dollars worth of taxable property in said consolidated area for a period of 25 years from September 30, 1941 for school purposes, should be levied.

"Let me state that the boundaries of the proposed consolidated school district did not coincide with the boundaries of the Beat lines necessitating on the part of the Hale County Court of Commissioners the making up of a **poll list** of electors residing within the proposed consolidated school area. The Hale County Court of Commissioners through the Hale County Judge of Probate notified through me the Hale County Board of Education that it was unable to make up a **poll list** because the Beat lines concerned and the lines of the proposed consolidated school district did not coincide.

"The attorney of the Hale County Board of Education then hired a competent person, a former employee of the Hale County Tax Assessor's office, to make up a **poll list** as desired. The purpose of this letter is to inquire of your department whether the Hale County Court of Commissioners, or the Hale County Board of Education shall pay for the special services of securing said **poll list.**"

I find, upon inquiry, that the election to which you refer in your letter of inquiry, was ordered and held under the provisions of Section 275, et seq., of the Alabama School Code of 1927.

This being true, it is my opinion that the expenses of preparing the poll list may be paid by the Court of County Commissioners of Hale County. Section 278 of the Alabama School Code of 1927 is specific authority for this conclusion. This Section is as follows:

"278. **Election Supplies. — When any election is to be held** in any County or **in any rural** or City school **district, under the provisions of this article, the Court of County Commissioners** or other governing **body shall provide the necessary** number of ballots, **poll lists,** tally sheets, bal-

lot boxes, booths, instructions for holding the election, and all other necessary and proper stationery **for holding said election;** and the Sheriff shall see that the same are delivered to the managers before the day of the election."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1941.

Hon. Coley Page,
Tax Collector,
Jackson County,
Scottsboro, Ala.

National Banks—Taxation—Personal Property—

The personal property belonging to national banks is exempt from direct assessment and taxation by the state or a political subdivision thereof.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated January 4, 1941 follows:

"I would like your early advice on a matter which has come up in this office.

"In going over the books of assessment in their regular session of March, 1940, the Board of Review assessed the American National Bank of Bridgeport, Alabama, with $2000.00 personal property, which covered office equipment, etc., according to their advice to me. This Bank had never assessed any personal property in the past years, and when Mr. F. W. Carr, Manager of the Bank, came in to pay the taxes of American National Bank, he refused to pay the taxes on this $2000.00 and claimed that it was an unlawful assessment. All the other banks in the County, including the First National Bank, Scottsboro, Ala., State National Bank, Scottsboro, J. C. Jacobs Banking Company, Scottsboro, The First National Bank, Stevenson, pay on personal property and have for the past several years. We have talked with the Members of the Board of Review and they refuse to take this assessment off.

"Please advise us whether or not this is a lawful assessment and should be collected, or what I should do in the matter.

"We would like to have an immediate reply to this letter for, as you know, something must be done in the matter at an early date and we do not know how to proceed without advice from you."

You are advised that, in my opinion, the assessment for taxation on the personal property of the American National Bank of Bridgeport, Alabama is an unlawful and wrongful assessment.

The only right a state has to impose any tax on any part of a national bank, or its assets, is a limited one, granted by Congress, and in the absence of such grant, no tax of any kind could be imposed upon any property of a national bank, U.S.C.A., Title 12, paragraph 548, as amended. An examination of this Act of Congress shows that, other than ad valorem taxes on its shares of stock and real estate, no tax may be imposed. **Owensboro Nat. Bank v. Owensboro,** 173 U.S., 664; 43 L.Ed. 850.

The above referred to paragraph of the United States Code Annotated, reads in pertinent part as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

This section does not permit a state, or any political subdivision thereof to tax the personal property of such banks. **Tarrant, Tax Collector v. Bessemer National Bank,** 7 Ala. App. 285, 61 So. 47; **Rosenblatt v. Johnston,** 104 U. S. 462, 26 L. Ed. 832; **People v. Weaver,** 100 U. S. 539, 25 L. Ed. 705; **Bank of California N. A. v. King County, et al.,** 16 Fed. Sup. 976.

In the last above referred to case the following statement is found:

"National banks are instrumentalities of the Federal Government, and states and counties are without power to tax the personal property of such banks. 12 U. S. C. A., para. 548. Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; Chase National Bank v. Spokane County, 125 Wash. 1, 215 Pac. 374."

"12 U.S.C.A., para. 548, Owensboro Nat. Bank v. Owensboro, 173 U.S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; Chase National Bank v. Spokane County, 125 Wash. 1, 215 Pac. 374."

In view of the above authorities you are advised that, in my opinion, the state, and its political subdivisions, are without power to tax the personal property of a national bank.

Therefore, since, in my opinion, the assessment of this property was unlawful and wrongful, you should include such assessment on your list of errors in assessment as provided by Section 178 of the 1935 Revenue Act, and should receive credit for the assessment as provided for by Section 179 of the 1935 Revenue Act.

Quarterly Report of Attorney General, Vol. XIX, p. 142.

Cf. Quarterly Report of Attorney General, Vol. XIX, page 239.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1941.

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

Judges of Probate—Fees—

1. Judges of Probate, whose annual compensation does not exceed Five Thousand Dollars, are entitled to an annual amount of not exceeding $400.00 for performance of any and all duties in relation to public roads.

2. Probate Judges not entitled to fees provided for in Section 6771 of Code, 1923 as amended by General Acts, 1939, page 1049, for performing duties in relation to public roads.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of January 21, 1941 follows:

"Under the law fixing the pay of the members of the Commissioners court, which law was enacted last July, I write to ask if the Judge of Probate, who is a member of the commissioners court, is entitled to $4.00 per day and mileage, if he goes out with one or more of the commissioners and inspects roads and bridges, when the same is previously ordered by the court. This is frequently ordered because of the experience of the presiding officer."

In my opinion your inquiry should be answered in the negative.

Section 7285, Code of Alabama, 1923, provides as follows:

"Section 7285. Fees allowed to judges of probate—Judges of Probate are entitled to the following fees for the following services:

"Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding . . . $400.00. But this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars * * *."

In construing the above quoted provision of our law, this office in an opinion to Hon. B. P. Singleton, State Comptroller, dated March 15, 1939 (Quarterly Report of Attorney General, Vol. 14, page 190) held:

"The duties performed by a probate judge in relation to public roads are recognized as ex-officio services. Macon County v. Abercrombie, Judge, 184 Ala. 283, 63 So. 985. For these ex-officio services, where net annual compensation of the Probate Judge is less than $5,000, the statute sets a maximum compensation of $400.00 per annum. All duties discharged by the probate judge in relation to public roads may be compensated for out of the county treasury, but the total annual allowance for such services cannot exceed $400.00. Biennial Report of Attorney General 1920-22, page 23. Biennial Report of Attorney General 1918-20, page 680 and Opinion of Attorney General to Hon. A. H. Glasgow, Judge of Probate of February 20, 1936, found in Quarterly Report Attorney General, Vol. II, page 182."

The foregoing opinion was written in view of Section 6771 of the Code of Alabama, 1923 and the act referred to in your letter (Act No. 662, H. 703, approved July 3, 1940, General Acts 1939, page 1049) does not affect the conclusion therein reached, inasmuch as Act No. 662, supra, merely amended Section 6771, supra, so as to increase the per diem payable to members of the Courts of County Commissioners or Boards of Revenue of the several counties of the State, operating under the general law, while occupied in the discharge of their duties. Neither Section 6771, supra, as it appears in the 1923 Code nor as amended by Act No. 662, supra, has any application to the compensation payable to Judges of Probate in regard to their duties in relation to public roads. **Swindle, County Treasurer, vs. Long,** 224 Ala. 55, 139 So. 87.

Premises considered, it is my opinion that the total annual compensation to which you are entitled to be paid from the county treasury for the performance of any and all duties in relation to public roads is an amount not exceeding $400.00. Of course, if your net annual compensation as Probate Judge exceeds Five Thousand Dollars then you would not be entitled to this fee.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1941.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Attention: Mr. S. W. Harbin.

Conveyances—Deeds—Acknowledgements—Witnesses—Notary Public.

1. Notary Public of one county not authorized to witness the signing of a conveyance in another county, and after returning to his home county acknowledge the conveyance.

2. Where the execution of a conveyance is attested by two subscribing witnesses and the conveyance is proved by one of the witnesses as provided by Section 6840 of the Code of Alabama, 1923, the conveyance, after being recorded, is self-proving.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of January 22, 1941, is as follows:

"In taking acknowledgements on right-of-way deeds and also on options for the purchase of road material, it is found difficult at times to have a Notary Public present at the signing of the above referred to documents.

"Is it permissible for a Notary Public of one county to witness the signing of a deed in an adjoining county and then return to his home county and acknowledge this signature? Also, in signing right-of-way deeds, if no Notary Public is present will the signatures of two witnesses be sufficient?

"In cases where there are two subscribing witnesses to the execution of the instrument, and subsequently, either in the same county or in another county, one of these subscribing witnesses acknowledges his signature before a Notary Public, is this acknowledgement sufficient under the law?"

This office has heretofore held that a Notary Public appointed by the Governor under the authority of Section 9238 of the Code of Alabama, 1923, cannot go out of the County for which he is appointed to take acknowledgements. Opinion to Hon. C. P. Butler, Judge of Probate, Opelika, Alabama, under date of February 3, 1927 (Biennial Report of Attorney General, 1926-28, page 84).

In the case of **Edinburgh American Land Mortgage Co. vs. Peoples,** 102 Ala. 241, 14 So. 656, it was held that an acknowledgement which showed on its face that it was taken in Henry County by a Notary Public appointed for Henry County, when, as a matter of fact, the conveyance was signed and acknowledged in Geneva County, was void. This case was followed in the case of **New England Mortgage Co. v. Payne,** 107 Ala. 578; 18 So. 164, wherein an identical situation arose. In the Edinburgh case, supra, the Supreme Court said:

> "The jurisdiction of an officer elected and appointed is local. It is confined to the territorial area for which he is commissioned. Within that territorial area, whether large or small, he can perform official functions. Outside of it he is a private person, having no official power or jurisdiction. An act done by him beyond the boundaries of his local jurisdiction, no matter how formal he may make it appear, is a sheer usurpation, having no official validity; and this is true of official trust, from the highest to the lowest. 1 Am. Eng. Enc. Law, 146, note 2; Share v. Anderson, 7 Serg. R. 43; Bradley v. West, 60 Mo. 33; Rackleff v. Norton, 19 Me. 274; Code 1886, Secs. 840, 1112."

It was held in the case of **Griffith v. Ventress,** 91 Ala. 366, 8 So. 312, which case was followed by **Shubert v. Winston,** 95 Ala. 514, 11 So. 200, that after the delivery of a deed, the officer before whom the grantors acknowledged it has no power to alter or add to his certificate or to make a new certificate without the grantors appearing before him and reacknowledging the conveyance.

In view of the foregoing authorities, it is my opinion that a Notary Public when outside his County cannot exercise any official authority, but is merely a private citizen, and further that a Notary Public is not authorized to execute a certificate of the acknowledgement except in the presence of the grantors of the conveyance. Therefore, the conclusion that a Notary Public of one county cannot go into another county and witness the execution of a conveyance and then subsequently, upon returning to the county for which he was appointed, acknowledge the execution. To hold otherwise would be to allow something to be done indirectly which could not be done directly. It would be in the nature of a subterfuge. It is well settled that such things may not be done in this State. In re: Opinions of the Justices, 225 Ala. 502, 144 So. 111.

Section 6838 of the 1923 Code of Alabama provides that a conveyance of real estate is sufficient if witnessed by one person, provided the grantor can write his name, or by two witnesses if he cannot write his name. Section 6840 of the 1923 Code of Alabama provides that an acknowledgement does away with the necessity of any witnesses.

It will be noted, however, that in order for conveyances to be self-proving as provided for by Section 6861 of the Code of Alabama, 1923, they must be acknowledged or proved according to law and recorded in the Probate Office of the county wherein the real estate lies. Section 6866 further provides that all conveyances admitted to record on proof must be attested by two witnesses, and that the proof must comply substantially with the form of

probate provided for by Section 6846 of the Code of Alabama, 1923, or the conveyances are not self-proving.

Therefore, you are advised that while one witness is sufficient under Section 6838 for the deed to be valid, it is necessary in order to make the deed self-proving that it be either acknowledged or attested by two witnesses and proved by one of these witnesses as provided for by Section 6846 of the Code of Alabama, 1923, and recorded.

It follows from the above that your last question should be answered in the affirmative. That is, where there are two subscribing witnesses to the execution of a conveyance, and subsequently one of these witnesses acknowledges his signature before a Notary Public as provided by Section 6846 of the Code of Alabama, 1923, the conveyance is then entitled to be recorded, and, upon being recorded, becomes a self-proving conveyance.

Therefore, you are advised that in securing your right-of-way-deeds you may sign as an attesting witness yourself, secure one more witness, and then you may subsequently probate the deed as provided for by Section 6846 of the 1923 Code of Alabama. The form provided for by Section 6846 is set out on most deed forms. This, in my opinion, may be done in any county before an officer authorized to take acknowledgements in that county.

There is no requirement of law that an option or contract to purchase personal property must be acknowledged or witnessed. It is, of course, desirable to have same witnessed, however.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1941.

Hon. Perry B. Hughes, Jr.,
Clerk, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

Keeping on file newspapers by Probate Judges, Circuit Clerks and Registers.

Section 5057 of the Code only punishes for failure of the named officers to subscribe for, keep and file weekly newspapers published in their respective counties.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of January 27, 1941 is as follows:

"Please give me your official opinion on section 5057 of the Code of Alabama, 1923 which says,

"'Any probate judge, clerk of the circuit court, or register who fails to subscribe for, take, file, cause to be bound, and safely keep in his office weekly newspapers, as required by law, must, on conviction, be fined not less than fifty dollars; and one conviction shall not bar a subsequent conviction for a continuing neglect.'

"What I would like to know is. if I as Clerk of the Circuit Court of Tuscaloosa County, will be required to abide by the said section. Would the word 'weekly' in said section mean daily paper also since there are no weekly papers in my county?

"Also, I would like to know if the Register in my county, who is on the fee basis, would be held to the said section."

This section makes it a misdemeanor for the Probate Judges, Clerks of Circuit Courts and Registers to fail to subscribe for, keep and bind weekly newspapers in their offices **as required by law.** The requirement to keep the weekly newspapers here referred to is found in Section 9268 of the Code. The requirement there enjoined is not any weekly newspaper, but only such weekly newspapers as are published in the county of such officer, and he must keep all the weekly newspapers of his county. An examination of these two Sections clearly shows that Section 5057 only undertakes to make a crime out of the failure to subscribe for, keep and bind the weekly newspapers published in the county of the officer, and none other. The officer is not required to keep any newspaper except weekly newspapers of his county.

It is true that Section 9269 of the Code provides that if **no newspaper** is published in the county of such officers, they **may** take and bind the newspapers of an adjoining county if the public printing and advertisement of his county is done in such adjoining county. That is to say, the officer is granted the authority to subscribe for such newspapers in an adjoining county, but he is not commanded to do so. Section 9268 says he must keep the weekly newspapers of his county. This is a requirement of the law that he must obey. Section 5057 punishes for this disobeyance. It follows that where there is no weekly newspaper published in the county of the officer he cannot be guilty of violating Section 5057 of the Code.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 4, 1941.

Hon. C. A. Waite, Sheriff,
Clarke County,
Grove Hill, Alabama.

Sheriffs—Fees—Probation—Intoxicating Liquors.

1. The fee of $50 provided by Section 4626 of the Code of Alabama, 1923, is payable when a defendant is convicted of unlawfully distilling or manufacturing or making prohibited liquors or beverages, regardless of whether or not the sentence is suspended and the defendant is placed on probation.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of December 23, 1940, in which you request my official opinion, is as follows:

"Your attention is called to an opinion appearing in Quarterly reports of the Attorney General, volume 18, page 18, wherein it is held that the Sheriff's fee in a case for manufacturing liquor or distilling is $25.00 under 4659 of the Code as amended 1933.

"Your attention is called to another opinion of the Attorney General appearing in Biennial Report of the Attorney General 1932-34, page 533 wherein it was held that this fee is $50.00, section 4626 of the Code which has not been amended and that section 4659 as amended applies only to cases of possession of a still and not to cases for manufacturing liquor or distilling.

"Is not your opinion in volume 18, page 18, in error in this regard? Your reconsideration of this matter is respectfully requested."

The question propounded in the opinion to Hon. Robert T. Simpson, Jr., Solicitor, Eleventh Judicial Circuit, Florence, Alabama, under date of January 8, 1940, (Quarterly Report of Attorney General, Vol. XVIII, page 18), was as follows:

"Please advise me whether or not the sheriff is entitled to his $50 fee where a defendant pleads guilty of manufacturing liquor and is placed on probation under the new probation act."

The answer to that request should have been as follows:

"The $50 fee referred to in your letter of inquiry is the fee provided by Section 4626 of the Code of Alabama, 1923, which reads as follows:

'4626. **Fifty dollars allowed sheriff or officer furnishing evidence to support conviction taxed as costs.**—Whenever any person is convicted in the circuit court of unlawfully distilling or manufacturing or making any of the prohibited liquors or beverages as defined by this Code, there shall be charged in the bill of costs to be paid and collected as other items of cost, the sum of fifty dollars to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction, and who shall satisfy the presiding judge that he is the person entitled to said sum, and shall receive from the judge a certificate to that effect.'

This Section, and the $50 fee provided thereby, were not affected in any way by the provisions of Act No. 183, S. 112, approved April 20, 1933 (General Acts, 1933, page 200), which amended Section 4659 of the Code of Alabama, 1923, which is the Section of the Code providing a fee when a person is convicted of manufacturing, giving away or having in his possession a still, apparatus, appliance or any device or substitute thereof to be used for the purpose of manufacturing prohibited liquors or beverages. See opinion to Hon. R. B. Ford, Sheriff, Randolph County, Wedowee, Alabama, under date of March 19, 1934 (Biennial Report of Attorney General, 1932-34, page 533).

Under Section 4626, supra, this fee of $50 is chargeable in the bill of costs on conviction whenever the presiding judge certifies as to whom is entitled to receive the same. This is true whether the defendant is placed on probation or not. See Section 8 of Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), generally referred to as the Probation Act.

In this connection, I call your attention to an opinion of this office rendered to Hon. William A. Conrad, Clerk of the Circuit Court of Mobile County, Mobile, Alabama, under date of October 17, 1939 (Quarterly Report of Attorney General, Vol. XVII, page 87)."

The above is hereby substituted for the opinion to Hon. Robert T. Simpton, Jr., supra, and that opinion is hereby overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1941.

Mr. W. H. Black, Superintendent,
Marshall County Schools,
Guntersville, Alabama.

Schools—

County Board of Education has no authority to pay certificate of indebtedness issued in 1932 if claim was not properly filed by December 1, 1939, in accordance with Section 11 of Act No. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 30, 1941, in which you request my opinion as follows:

"Mrs. Lola Segler McDonald has presented for payment a Certificate of Indebtedness. This certificate was issued by the Marshall County Board of Education and dated February 12, 1932 for $16.25.

"Question: (1) Is there a statute of limitation on payment of certificates of indebtedness?

"(2) If not, how may we be sure that this certificate has not already been paid?

"(3) How should payment be made by the County Custodian of School Funds?"

It is my opinion that your first question should be answered in the affirmative.

Section 11 of Act No. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610), provides as follows:

"Section 11. UNFUNDED DEBTS.—If any county or city board of education has outstanding on October 1, 1939, any unfunded or floating debts, an itemized statement of the same shall be filed by said board with the State Superintendent of Education not later than December 1, 1939. Upon the approval of the State Superintendent of Education said Board shall have the authority to pay said floating debts from any balance on hand at the close of any fiscal year provided that this authority shall expire on October 1, 1945."

You do not state in your letter of inquiry that the provisions of the foregoing Section have been met, and, indeed, the records of the State Superintendent of Education reveal to the contrary. Therefore, the claim in question, an unfunded debt outstanding on October 1, 1939, cannot now be paid, for Section 11 authorizes payment of only such unfunded debts which have been listed in the itemized statement filed by the County Board of Education with the State Superintendent of Education not later than December 1, 1939. Cf. Quarterly Report of Attorney General, Volume XVI, page 275, 276; Quarterly Report of Attorney General, Volume XIX, page 79.

In view of my answer to your first inquiry, I find no necessity for answering your second and third questions.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1941.

Hon. J. W. Truitt, Clerk,
Circuit Court, St. Clair County,
Ashville, Alabama.

Clerks of Circuit Courts—Records—

1. Clerks may charge Selective Service agencies for certified copies of records furnished them.

2. Ex-Clerk is not entitled to remove book containing bound copies of receipts for monies paid to county treasurer.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of February 4, 1941, is as follows:

"We would appreciate an opinion from you on the following matters:

"1. Is the Clerk's Office permitted to charge the Selective Service for certified copies of the record of conviction or of other records?

"2. Would an Ex-Clerk be entitled to take a book, a page from which is enclosed, or is it the property of the County and should it remain in the vault in the Clerk's office as part of the permanent record?"

In answer to your first inquiry, it is my opinion that the Clerk of the Circuit Court is entitled to charge the agencies of the Selective Service System, instrumentalities of the Federal Government, establishd under the authority conferred by Public Act No. 783, 76th Congress, approved September 16, 1941 (the Selective Service and Training Act of 1940), for certified copies of the record of conviction or copies of other records furnished them at their request.

Section 6723(14) authorizes the Clerk of the Circuit Court to "make out and deliver, on application and payment of the legal fees therefor, to any

person applying for the same, a correct transcript, properly certified, of any paper or record" in his office. Section 7278 of the Code of Alabama, 1923, provides fees for such services.

The fee allowed is for the performance of a specific service, i. e., the making and furnishing of copies of records. It is not in the nature of a tax. The Supreme Court of the United States has recognized the propriety of the collection of a reasonable fee to meet the expenses of performing a service in a number of cases. In **Federal Land Bank v. Crosland,** 261 U. S. 374, it was held that while no right existed to collect a tax imposed as a commission for the recording of a mortgage executed to a Federal Land Bank, a reasonable fee to meet the expenses of the registration might be collected. Cf. **Pittman v. Home Owners Loan Corporation,** 308 U. S. 21, 124 A.L.R. 1263. In **Red "C" Oil Company v. Department of Agriculture,** 222 U. S. 380, a fee imposed for services rendered in the inspection of kerosene was upheld. Cf. **Pure Oil Company v. Minnesota,** 248 U. S. 158.

This office has also held that gasoline inspection fees may be collected on gasoline sold directly to the Federal Government, since such fees do not constitute a tax for State support, but rather are imposed to defray the cost of the rendition of a service (Quarterly Report of Attorney General, Volume XVIII, page 371.)

In view of the foregoing authorities, you are advised that you may charge for furnishing certified copies of records of conviction or of other records to agencies of the Selective Service System.

Upon the facts which you submit in your second inquiry, and upon an examination of the blank page enclosed from the book inquired about, I am unable to state that the book is not such a quasi public record, the possession of which is essential to the functioning of the office of the Clerk and of the Clerk as Ex Officio Clerk of the County Court. **Watford v. Lawson,** decided November 16, 1940 (Supreme Court MS).

It would seem to me that the best policy to follow is to retain the records in your office where they should be kept as other records pertaining to the Clerk's office. Cf. Quarterly Reports of Attorney General, Volume XIX, page 110; Volume XX, page 163.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1941.

Hon. P. S. Owen,
Superintendent of Education,
Chambers County,
LaFayette, Alabama.

Chambers County—Schools—County Superintendents of Education—

Terms of office of County Superintendent of Education of Chambers County, elected under the provisions of Act No. 71, S. 96, approved June 3, 1935 (Local Acts, 1935, p. 8), discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 5, 1941, in which you request my official opinion as follows:

"I hereby request and shall thank you to give me your opinion on the following matters:

"1. In Section 2 of an Act, being Senate Bill No. 96, by Mr. Walton, appearing on page 8, Local Acts of Alabama, 1935, is found the following language:

'And shall hold office until the first Monday after the second Tuesday of January, 1941.'

"Please advise and give me your official opinion as to the exact time such officer went out of office, referring to the Superintendent of Education who was elected on July 1, 1936, and who held office under said Act until the first Monday after the second Tuesday of January, 1941. In other words, would this officer hold office until 12:00 o'clock on Sunday night preceding the first Monday after the second Tuesday of January, 1941, or, if not, just what time would he go out of office?

"2. In Section 3 of said Act is found the following language:

'And who shall hold office for a term of four years from the first Monday after the second Tuesday in January next after his election.'

"Please give me your official opinion as to the time and hour when the Superintendent of Education who was elected in the general election in 1940 assumed the duties of his office under this Act."

In answer to your inquiries, it is my opinion that the de jure term of office of the Superintendent of Education, who assumed office on July 1, 1936

expired at midnight Monday, January 20, 1941, and that the de jure term of the Superintendent elected at the general election in 1940 began on Tuesday, January 21, 1941 and will expire at twelve o'clock midnight of the first Monday after the second Tuesday in January, 1945. This answer is, of course, predicated on the assumption that the last named superintendent properly qualified to assume office at the time mentioned.

The act under consideration is Act No. 71, S. 96, approved June 3, 1935 (Local Acts, 1935, page 8), which provides for the election of a county superintendent of education for Chambers County, Alabama, fixes his term of office, etc. Sections 2 and 3 of said Act provide as follows:

"Section 2. That immediately after the passage of this Act, a special election shall be called by the Probate Judge of Chambers County, Alabama, and held in Chambers County, Alabama, the expenses thereof to be paid out of the general funds of said County, for the purposes of electing a County Superintendent of Education for Chambers County, Alabama, by the qualified electors thereof, and who shall assume the duties of his office on July 1, 1936, and shall hold office **until** the first Monday after the Second Tuesday of January, 1941, or until his successor is elected and qualified. (Emphasis supplied)

"Section 3. That there shall be elected at the general election in the State of Alabama in 1940, and every four (4) years thereafter a County Superintendent of Education for Chambers County, Alabama, by the qualified electors of said County, and who shall hold office for a term of four years **from** the first Monday after the second Tuesday in January, next after his election and until his successor is elected and qualified." (Emphasis supplied)

It will be noted that in Section 2, supra, the phase "until the first Monday etc." is used, while in Section 3, supra, the phrase "from the first Monday etc." is employed. In order to arrive at the meaning of the word "until," as used in Section 2, supra, it will be necessary to first determine the meaning of the word "from" as used in Section 3, supra.

Our Supreme Court in the case of **Oberhaus v. State,** 173 Ala. 483, 55 So. 898, in construing the phrase "from the first Monday, etc." in relation to the term of office of the Governor stated:

"* * * must be construed as fixing the terms of the Governor and other state officers therein named as beginning on Tuesday, and as not including the Monday from which the terms begin to run; and that the meaning is too plain to permit of alteration by legislative enactment or popular usage.

"We therefore hold that Gov. Comer's term of office de jure expired at midnight on Monday, January 16, 1911; and consequently Gov. O'Neal's term de jure began on and with the Tuesday following."

From the above, it follows that the de jure term of the Superintendent of Education elected at the general election in 1940 did not begin until (including) Tuesday, January 21, and will expire at midnight on the first Monday after the second Tuesday of January 1945, the term being for four years. He could not have assumed office before the said Tuesday.—Cf. Opinion of Attorney General to Clerk of Circuit Court of Escambia County on January 13, 1941, (copy enclosed).

We are now presented with the question as to the meaning of the phrase "until the first Monday etc." as used in Section 2, supra. In the case of **Louisville & N. R. Co. v. Scott,** 232 Ala. 284, 167 So. 572, our Supreme Court observed:

> "When a period of time in which an act must be done is referred to as 'to', 'till,' or 'until' a certain date, such words usually exclude the specified date. Oberhaus v. State, 173 Ala. 483, 55 So. 898; Richardson v. State, 142 Ala. 12, 39 So. 12; Heal v. State, 147 Ala. 686, 40 So. 571. But this construction is not of universal application, dependent upon the intention with which it is used as manifested by the context, and considered with reference to the subject to which it relates. 62 Corpus Juris 986."

The exception rather than the general rule, as above set out, is applicable to the instant situation. "Until the first Monday" as used in Section 2, supra, in my opinion, should be construed to include said Monday. This construction evinces the true legislative intent in view of the wording of Section 3, supra, and the interpretation placed on such wording by our Supreme Court. To hold that the general rule (excluding said Monday) rather than the exception (including said Monday) should be followed in the instant case, would result in a situation whereby the first de jure term would expire at midnight Sunday, January 19, 1941 and the second de jure term would not begin until (including) Tuesday, January 21, 1941. It is true that the proviso of Section 2, supra, "or until his successor is elected and qualified" would prevent a vacancy occurring on Monday January 20, 1941. But, this proviso does not, in my opinion, alter the conclusion reached herein as to the de jure terms of the office in question.

In any event, the Superintendent elected at the general election in 1940 did not assume office until (including) Tuesday, January 21, 1941, and the one who assumed office on July 1, 1936 held the same until that time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1941.

Hon. G. Claiborne Blanton,
Judge of Probate, Dallas County,
Selma, Alabama.

Constitutional Amendment—Dallas County—Officers, Salaries, Unexpired Term—

An appointee to fill an unexpired term takes salary prescribed by law at the time of his appointment.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of January 28, 1941, in which you request my official opinion as follows:

"Our mutual friend and legislator John L. Sherrer tells me that you or one of your assistants advised him 'horseback' that Commissioner Robert T. Jones who succeeded me on the local Court of County Revenues will come under the recently enacted salary bill for Dallas County.

"You are referred to 178 Sou. page 535, Poyner vs. Houston County, et al. and 235 Ala., page 304, also 170 Ala., page 165, Thomas vs. Gunter; also 54 Sou. page 283.

"Will you render me an opinion on the following question: Does Robert T. Jones, Commissioner of the Court of County Revenues of Dallas County, Alabama, who was appointed to fill out the unexpired term of G. C. Blanton, receive a salary of $50.00 per month under the terms of the Constitutional Amendment passed by the electors of this State on November 5, 1940, affecting the officeholders of Dallas County, Alabama; or does he continue to draw the pay of the present commissioners, none of whom come under said salary bill until after the next election."

The Constitutional Amendment relating to Dallas County as submitted by Act No. 566, (General Acts, 1939, page 896) and proclaimed ratified on November 15, 1940, in pertinent part is as follows:

"The salaries of the following named county officers of Dallas County, Alabama, but subject to the provisions of Section 281 of the Constitution of Alabama, are fixed as follows: Judge of Probate, $6,000.00 per annum net; Tax Assessor, $5,000.00 per annum net; Tax Collector, $5,000.00 per annum net; Sheriff, $4,800.00 per annum net; Circuit Clerk, $2,400.00 per annum net; Register in Chancery, $1,200.00 per annum net; provided, that if the same person holds the offices of Circuit Clerk and Register in Chancery, the salary for both offices shall be $3,000.00 per

annum net; members of the county governing body, exclusive of the Judge of Probate, $600.00 each per annum net.

* * * * * * * *

"The salaries of the above named county officers of Dallas County, Alabama, shall be paid out of the county treasury in equal monthly installments."

Mr. Robert T. Jones, Commissioner, Court of County Revenues, Dallas County, was appointed to fill the unexpired term of G. C. Blanton at a time subsequent to the ratification of the said Amendment. In the case of **Poyner vs. Houston County, et al.,** 235 Ala. 304, 178 So. 535, Mr. Justice Bouldin, in the opinion of the Court, held:

"An appointee to fill an unexpired term takes the salary prescribed by law at the time of his appointment. State vs. Gunter, 170 Ala. 165, 54 So. 283."

See also opinion of this office under date of September 24, 1940, to the Judge of Probate, Dale County, Ozark, Alabama, (Quarterly Reports of Attorney General, Volume XX, p. 317).

In my opinion Mr. Jones, having been appointed to fill the unexpired term of Mr. Blanton, will be entitled to receive the sum of $600.00 per annum, payable monthly, as provided by the Constitutional Amendment, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1941.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Highways—Dedication—Rights-of-way—

Where the State acquires property for right-of-way the fee in the land, including minerals, remains in the owner of the abutting property, subject to such easement as the State might have acquired by the act of dedication.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of January 21, 1941, in which you request my opinion as follows:

"Re: F.A.P. 156 (2) Barbour County.

"On the above project which extends from Eufaula to the Henry County line on U. S. 241, now under contract for construction, there are deposits of bauxite along certain sections of the route. At one point of this route, on land owned by Mr. E. W. Vance deposits were pointed out to our survey party when this survey was made. Mr. Vance indicated that tests were being made of this material, which if found to be of merchantable quality, request would be made to relocate the road so as to miss the deposits. Later, tests indicated this material was not considered of commercial value, and subsequently Mr. Vance executed a right-of-way deed for this land. I attach a copy of this deed, hereto.

"Now, it has developed that there is merchantable bauxite on the area granted for right-of-way. Mr. Vance has requested permission from this Department to secure any merchantable bauxite from the area granted for right-of-way which can be moved prior to the date that the grading contractor will start operations on this area. Mr. Vance has indicated that if this permission is granted he will fill this excavation made by him with suitable earth material and properly consolidate same.

"Will you kindly advise me as early as possible regarding the following questions?

"1. Under the terms of the right-of-way which has been executed is it necessary for Mr. Vance to secure from this Department permission to secure bauxite from within the limits of the right-of-way provided this is done prior to construction activities and provided it is done in such a manner that it will not interfere with the construction operations?

"2. If it is necessary for Mr. Vance to secure this permission, can I, as Highway Director, authorize this material be secured provided it is taken in such a manner and at such time that it will not interfere with the construction operations, or add to the cost of the Project?

"I may state as further information, that this material normally lies within a few feet of the surface of the ground and ordinarily would not extend more than six to ten feet from the surface. The deposits usually occur in 'pockets' of relatively small area which means that usually this material is secured by hand labor methods or light power equipment and all of the operations are surface operations.

"Prompt reply will be appreciated on this matter as there will be relatively short time for the owner to acquire this material if it is found he has a right to do so."

The established rule of law in Alabama is that when the State procures a right-of-way for the purpose of a public highway, whether it be by dedication, purchase, or condemnation, the fee in the land remains in the owner of the land abutting on the road, subject only to such burden or easement in favor of the public as were conferred by the act of dedication.

Cloverdale Homes vs. Town of Cloverdale, 182 Ala. 419, 62 So. 712,

Western Railway of Alabama vs. Alabama Great Trunk Railway Company, 96 Ala. 272; 11 So. 483;

Hobbs vs. Long Distance Telephone & Telegraph Co., 147 Ala. 393, 41 So. 1002;

See also opinion of the Attorney General under date of July 9, 1940, to Hon. Chris J. Sherlock, State Highway Department, (Quarterly Report, Vol. XX, p. 30).

In accord with the Alabama rule is the general rule that the title to the soil and all the profits thereof consistent with the existence of the easement remain in the original owner.

Woodruff vs. Neal, 28 Conn. 165;

Rawls vs. Tallahassee Hotel Co., 43 Fla. 288, 31 So. 237;

See also 29 C. J.—Highways—Sections 257-259, p. 540.

Applying these general principles of law to the present inquiry, I am of the opinion that it would not be necessary for Mr. Vance to secure from the Highway Department permission to remove bauxite from within the limits of the right-of-way, provided this is done prior to construction activity and in such manner that easement of the State will not be interfered with to its detriment.

In reply to your second inquiry, it is not necessary for Mr. Vance to secure the permission of the Highway Department for the removal of this material, however, I would suggest an agreement by and between Mr. Vance and the Highway Department with regard to the condition in which the right-of-way will be left after the removal of these materials.

The State claims no right, interest, or title to any mineral situated on the right-of-way, but it should insist that its easement already acquired be protected from any detriment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 13, 1941.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Delicatessens—Restaurants—Grocery Stores—Licenses—

1. When a retail grocer installs a refrigerator case or like equipment, wherein cooked foods are displayed and sold for consumption off the premises, it is a question of fact as to whether or not such grocer is liable for the delicatessen license imposed by Schedule 47 of the 1935 Revenue Act.

2. When a restaurant or lunch counter has secured a license under Schedule 120 of the 1935 Revenue Act, such license does not exempt such restaurant or lunch counter from the delicatessen license imposed by Schedule 47 of the Revenue Act of 1935, if, in fact, such restaurant or lunch counter is otherwise subject to the delicatessen license.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated January 6, 1941, is as follows:

"Re: License Schedule 47.

"The above numbered Schedule of the 1935 Alabama Revenue Laws reads as follows:

" 'Each DELICATESSEN where cooked foods are sold for consumption other than on the premises, ten dollars ($10.00).'

"The License Inspector of Mobile County has cited various retail grocers in Mobile County who, in his opinion, came under the terms of the above Schedule. These grocery stores have a refrigerated case or like equipment, wherein cooked foods are displayed and are sold for the purpose of being taken away from the place of business by the purchaser. In your opinion do the retail grocers who sell such food products for consumption other than on the premises where purchased owe the license under Schedule 47?

"Further, would a license under Schedule 120, (restaurant, lunch counters or public eating houses) exempt one from the Delicatessen license if the restaurant or cafe sold Delicatessen as defined in Schedule 47, **in addition** to the operation of the restaurant?"

Your first question does not admit of a definite answer, as, in my opinion, it is a question of fact as to whether or not the retail grocers mentioned in your request are liable for the delicatessen license imposed by Schedule 47 of the Revenue Act of 1935.

It is a well-known rule of statutory construction that words used in a statute should be given their plain, ordinary and commonly-accepted meaning. **Ex Parte Pepper,** 185 Ala. 284, 64 So. 112; **Edwards v. Doster-Northington Drug Company,** 214 Ala. 640, 108 So. 862.

Through long usage the word "delicatessen" has acquired a definite ordinary and commonly-accepted meaning. This word is commonly accepted to mean a store in which certain and definite articles are sold. Webster defines the word to mean:

> "Prepared foods, such as cooked meats, preserves, relishes, etc.; also, a store where such foods are sold."

It is, therefore, my opinion that if the retail grocers mentioned in your request do not, as a matter of fact, display or sell from their refrigerated cases those articles which are commonly and ordinarily sold in delicatessens, then they would not be liable for the license imposed by Schedule 47, supra. However, if the primary business of such places of business is the sale of "delicatessen products" and grocery sales are merely incidental thereto then a license imposed by Schedule 47, supra, might be legally exacted.

As stated in the outset of this opinion, the answer to your request hinges upon a question of fact, which this office cannot pass upon. The above general rules are set out merely for your guidance in determining the facts in each individual case.

My answer to your second question is in the negative.

I assume from your question that the restaurant in question keeps on hand and sells a complete line of goods ordinarily and commonly sold in delicatessens, in addition to the operation of the restaurant.

In this regard, I call your attention to Section 356 of the Revenue Act of 1935, which reads as follows:

> "Section 356. Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

In find no provisions of the 1935 Revenue Act which exempt restaurant operators from paying additional licenses, if such restaurants engage in other businesses than as provided in Schedule 120 of the Revenue Act of 1935.

Therefore, it is my opinion that under the provisions of Section 356, supra, a restaurant operator would be liable for the license imposed by Schedule 47, supra, if such restaurant operator conducted a delicatessen

business as defined in said Schedule, in addition to his regular restaurant business.

Cf. Quarterly Report of Attorney General, Volume VII, page 148; Quarterly Report of Attorney General, Volume VIII, page 220; Biennial Report of Attorney General, 1934-1936, page 446; Biennial Report of Attorney General, 1936-1938, page 738.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 14, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Surveys—Maps or Plats—Municipal Corporations—

1. Under Act No. 208, H. 266, approved August 2, 1927 (General Acts, 1927, page 217), map of a subdivision under Alabama Code of 1923, Sections 10357 and 10358, within the corporate limits or police jurisdiction of a city of more than 100,000 population, must be approved by the City Engineer of such city before it is entitled to be recorded in the Probate Office of the County where the lands are situated.

2. A map or plat purporting to divide a tract of land into numbered lots abutting on strips of land obviously intended as streets and alleys but marked on the map "Private Property Not Dedicated" comes within the purview of said Act No. 208 and is not entitled to record without the approval of the City Engineer in such cities.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of January 23, 1941, follows:

"I am enclosing, herewith, a photostatic copy of a map which has been presented for record in this office. Please advise me if I can accept this map for record without the approval of the City Engineer of the City of Birmingham in view of the requirements contained in an Act approved August 2, 1927 (Acts 1927, page 217)."

The document in question purports to be a map or plat of land in Jefferson County, Alabama, and in your letter of February 10 you advise said land is within the City of Birmingham itself. It is designated as "Vernon's Addition to Birmingham, situated in NW¼ of SE¼ of Sec. 19, Tp. 17, S. R. 2W.", and is surveyed, platted and divided into twenty lots numbered 1 to 20, inclusive, approximately 40 feet wide and varying in length from 82.67 feet to 189.11 feet.

Along the North side of the platted land extends a strip 25 feet wide designated as "Wilmuth Place", and on the South side is another strip of land 16.17 feet wide and extending 446.18 feet. Through the middle of the tract extends another strip of land 10 feet in width from East to West, and on the East and West sides of the land are other strips 10 feet in width.

Obviously, the plat was prepared and is offered for record pursuant to the provisions of Sections 10357 and 10358 of the Code of Alabama of 1923, and it is equally obvious that the object or purpose of such survey and plat was "to divide the land into town lots", presumably for sale.

Section 10357 of the Code, supra, requires that:

> "Such plat or map shall show the streets, alleys, and public grounds, and give the bearings, length, width, and name of each street, as well as the number of each lot and block."

Section 10358 requires that such map or plat shall be certified and acknowledged by a surveyor and the owner or owners of the land before it is received for record in the office of the Probate Judge of the county in which the land is situated.

It will be observed also that the four strips of land above referred to as boundaries of the tract in question, while not expressly designated as streets or alleys, and in fact marked on the plat "Private property, not dedicated", are each of them intended for reservation or use as streets or alleys in connection with the numbered lots abutting thereon.

Act No. 208, H. 266, approved August 2, 1927 (General Acts, 1927, page 217), reads as follows:

> "That it shall be the duty of every Probate Judge in this State to decline to receive for record in his office any map or plat upon which any lands lying within the corporate limits or police jurisdiction of any city of this State having a population of more than one hundred thousand inhabitants according to the last or any succeeding Federal census are platted or mapped as streets, alleys or other public ways unless such map or plat shall have noted thereon the approval of the City Engineer of such city."

It will be seen, therefore, that the map or plat in question does not comply with statutory law, (1) in that it fails to name or to show, expressly at least, the streets, alleys and public grounds to be used in connection with

the lots when sold and improved, and (2) it fails to show also the approval of the City Engineer of the City of Birmingham as required by Act No. 208, supra.

I am of the opinion, therefore, that you are not authorized to accept this map for record without such approval of the City Engineer.

I find no opinions of this office nor any decisions of the Supreme Court of Alabama directly bearing on this question, but I think that the above conclusion is well founded.

In **Manning v. House,** 211 Ala. 570, 100 So. 772, it was held that where an owner causes his land to be surveyed and platted, whether the plat be recorded or not, and sells one or more lots according to the plat, it constitutes a complete dedication of streets laid out on the plats; and that a map of a platted tract relied on as a dedication of a street is to be construed as other writings, according to its natural and reasonable import to those whose interests are affected.

In that case it was said:

> "The fact that the street extension on the map was in dotted lines would not, in our opinion, give any notice that it was not a street **in esse.** * * * Placing the map of record for public inspection and the actual opening of the connection at Thirty-Eighth Avenue evidence an invitation to the public inconsistent with a mere permissive use. While not a statutory map it evidences a like intent. Here, as in other cases, a party must be held to intend the natural consequences of his acts; the intent as read from the acts of the owner."

To the same effect are the cases of **Town of Leeds v. Sharp,** 218 Ala. 403, 118 So. 572; and **Nixon v. City of Anniston,** 219 Ala. 219, 121 So. 514.

So it is, in my opinion, that the fact that streets are not nominally or expressly designated as such on the map in question, and although they are marked "Private Property, Not Dedicated," yet it is too plain for argument that it was intended to show the streets and alleys on the plat and to sell lots accordingly. A lot without the right of ingress and egress would be but a poor lot indeed, and could hardly be sold to any buyer.

Under the authorities above cited a purchaser of any of the twenty lots shown on the plat would unquestionably be entitled to claim these so-called approaches to be public highways. Such being the effect, I conclude that the plat must be approved by the City Engineer under Act No. 208, supra, before it is entitled to record.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 14, 1941.

Hon. T. C. Garner,
Treasurer,
Jefferson County,
Birmingham, Alabama.

Jefferson County—Road Tax—

The road tax required to be levied by the governing body of Jefferson County under Act No. 395, H. 806, approved February 17, 1885, (Acts 1884-85, p. 709) must be shared with the municipalities of said county as provided by Section 6774 of the Code of 1923.

Said governing body is under duty to levy said tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of February 5, 1941 follows:

"Under an act approved February 17, 1885 (1884-85 Acts of Alabama, page 709), Jefferson County levies a special road tax on one-tenth of one per cent. In a subsequent act, 1909 General Acts of Alabama, page 303, it is provided that where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads or highways, the county shall pay over each year to each municipality therein one-half of the money collected on such road tax on the property located in such municipality. The provisions of said act of 1909 were brought forward in the Code of Alabama of 1923 as Sections 6773, 6774, and 6775 in substantially the same form.

"There has been some question raised by a state examiner as to the right of the municipalities to receive one-half of this tax as provided for in the 1909 apportionment act. Claims have been filed by the City of Birmingham and other municipalities for their share of this road tax. This 10c levy really constitutes a part of the one-half of one per centum which the county is authorized to levy and which accrues to its general fund under Section 215 of the Constitution. Will you kindly advise as follows:

"1. Is the county required to make this special road tax levy of one-tenth of one per cent under the terms of the 1884-85 Act above referred to.

"2. If the county is required to make the levy in accordance with said act, then please advise whether or not I am required to pay over to

a municipality one-half of the money collected on such road tax on the property located in such municipality.

"Due to the fact that the payment of these claims is now being held in abeyance pending the receipt of your opinion, I would appreciate it if you would let me hear from you at your very earliest convenience."

Act No. 395, H. 806, approved February 17, 1885 Acts of Alabama, 1884-85, p. 709), is entitled "To provide for the working of the public roads in Jefferson County by contract, and to further regulate the working of the roads in said County." Said Act directs the county governing body to "levy a special tax on one-tenth of one per cent * * * to be applied to the working of public roads in said County, as hereinafter provided; **Provided,** that no levy shall be made * * * exceeding one-half of one per cent, for the ordinary county purposes, not including necessary public buildings or bridges."

Section 5 of Article XI of the Constitution of 1875 was at that time the organic law of Alabama. It limited the county **ad valorem** rate of taxation to one-half of one per centum, generally, but authorized an additional levy of one-fourth of one per centum to pay existing debt, and also additional levy of such special taxes, legislatively authorized, to pay the cost of future **"erection of necessary public buildings or bridges."**

The Act of February 17, 1885, read in connection with the then existing Constitutional provision above referred to, must be construed as including within the five mill tax then permissible the one mill tax directed by said Act to be levied in Jefferson County "for the working of the public roads." Otherwise, said "special tax" was vulnerable to Constitutional attack, as recognized by the proviso in Section 1 of said Act. **Frederick v. Northern Ala. Co.,** 130 Ala. 407, 30 So. 426.

The remaining sections of the Act require the road work thereby contemplated to be done by contract, and restrict such work to roads outside the City of Birmingham, (Section 2); authorize hiring county convicts to contractors doing such work (Section 3); require contractors' bonds (Section 4); require such work done under supervision of engineers employed by the County (Section 5); and finally (Section 6), require payment for such work to be made out of the fund raised by levy of the special one-mill tax.

It will be noted that the county governing body of Jefferson County has in the past levied, and continues to levy, this special tax pursuant to the mandate of the Act of 1885, and that said tax "really constitutes a part of the one-half of one per centum which the County is authorized to levy, and which accrues to its general fund under Section 215 of the Constitution."

I assume, therefore, that the tax is not levied as a part of the "one-fourth of one per centum" specified in Subdivision (a) of Section 215 of the Constitution of 1901, as a limited fund "to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or **roads.**"

In 1901 the Board of Revenue of Jefferson County levied a one-mill tax for macadam roads, 2½ mills for the general fund, one mill for bridges and public buildings, one mill for public schools, one mill for school tax voted June 20, 1904, and one-fourth of one mill for sewer bonds. In a mandamus proceeding, the Court ordered payment of $22,160 by the County to the City of Birmingham as its portion under the Act of August 26, 1909, now appearing as Sections 6773-6775 of the Code of Alabama, 1923, of the road tax thus levied upon property in the City.

This judgment was affirmed by the Supreme Court after much discussion and dissension, and it was held that the one-mill tax aforesaid was not a levy under Subdivision (a) of Section 215 of the Constitution. The opinion does not state whether or not the levy was made pursuant to the Act of 1885, supra.

Board of Revenue of Jefferson County v. State, ex rel City of Birmingham, 172 Ala. 138, 54 So. 757.

In 1930, in **Jefferson County v. City of Birmingham,** 221 Ala. 476, 129 So. 48, the Court had squarely before it for consideration the one-mill tax levied under the Act of 1885 (Acts, 1884-85, p. 709), as affected by Section 6774 of the Code of Alabama, 1923, and affirmed the decree of the lower court overruling demurrers to the City's bill to enjoin County from diverting the City's share of said tax, payable pursuant to said Section 6774, and to enforce payment thereof.

The validity of said Act of 1885 was not affected by ratification of the Constitution of 1901, which expressly declares (Section 287—Schedule), that laws then in force "and not inconsistent herewith, shall remain in full force until altered or repealed by the legislature."

In said Act of 1885 I find no inconsistency with any provision of the Constitution of 1901, nor do I find any legislative enactment altering or repealing said Act.

It is to be noted, also, that the Act of 1885 is mandatory in tone, rather than permissive, in that the county governing body **"shall levy** a special tax," etc. And evidently the governing body itself has so construed the Act these many years, and to such construction due weight should be accorded.

I conclude, therefore, that the one-mill tax in question should be levied until the Act of 1885 is altered or repealed by the Legislature; and that said tax must be apportioned, pursuant to the mandate of Section 6774 of the Code of Alabama, 1923, between the County and the various municipalities therein.

This conclusion is not affected by the decision in **County of Montgomery v. City of Montgomery,** 190 Ala. 366, 67 So. 311. In that case it was held merely that where the county transferred a surplus or balance in its general fund to its road and bridge fund, the fund thereby created was not subject to division with the City, because forsooth it did not arise from levy of a

road tax, general or special, nor did it come within the language of Section 6774; viz., "where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads and highways of any description in the county."

Nor does this instant opinion conflict with the Attorney General's opinion of September 23, 1937, to Hon. Chas. W. Lee, State Comptroller (Biennial Report, 1936-38, p. 391), with reference to road taxes levied under Section 215, subdivision (a) of the Constitution, expressly excepted from division by the statute itself.

My conclusion is in harmony with the opinion of this office rendered December 3, 1928, to the Chief Examiner of Accounts (Biennial Report 1928-30, p. 79), that Jefferson County must pay to the City of Birmingham one-half of the **net** proceeds "collected under a special tax levy for road purposes on property in the City of Birmingham." Indeed, on that occasion the only question was whether the half-portion was of gross or net proceeds of the tax, and there was no doubt at that time as to the application of Code Section 6747, or its controlling influence or validity.

If the one-mill tax for road purposes under the Act of 1885 has, by reason of changed and rapidly changing conditions, become ill adjusted to present affairs, the remedy must be sought in the Legislature, rather than by construction or judicial legislation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 14, 1941.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Implied powers of county governing body—Recording fees—

County governing body of Pickens County has implied authority under Act No. 159, approved March 15, 1939 (Local Acts, 1939, p. 86), to buy or lease land upon which to build or maintain buildings in which to hold elections.

Number of words in filing or recording certificate should be included in calculating the recording fee on conveyances and other instruments filed in the Probate Office.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion of February 4, 1941, follows:

"(1) Under Local Acts of the Legislature No. 159, approved March 15th, 1939, Local Acts 1939, page 86, or under any other general law, has the Court of County Commissioners of Pickens county authority to lease or purchase a lot on which and maintain houses in the various precincts of the county, in which to hold elections?

"(2) Acting under authority of an opinion rendered by Chief Justice Brickell in the case of Tillman vs. Wood, Alabama Reports Volume 58, page 578, I have always counted the number of words in the filing or recording certificate and included that number in calculating the recording fee on conveyances, etc. filed in the Probate Office. I shall appreciate your reading that opinion in connection with an opinion of Attorney General Thomas E. Knight rendered on February 20th, 1931, to Judge G. H. Howard, of Elmore County, and advise me if I am legally authorized to include the words of the filing or recording certificate in the total count.

"For your convenience in comparing and construing Section 6855 of the present Code with Section 2148 of the Code of 1876, which was the law in effect at the time of Judge Brickell's decision, I am attaching hereto an exact copy of each section."

In my opinion your first question should be answered in the affirmative. Your county governing body is expressly given authority to use the county general funds for the purpose of building and maintaining houses in the several precincts of the county, in which to hold elections. Section 1 of Act No. 159, S. 153, approved March 15, 1939 (Local Acts, 1939, p. 86), provides as follows:

"Section 1. That the Commissioners Court of Pickens County, Alabama, or other governing body of said County, be and the same is hereby authorized and empowered to appropriate money out of the general funds of said County, for the purpose of building and maintaining houses in the several precincts of said County in which to hold elections therein."

The expressed authority given to your county governing body carries with it the implied authority to lease or buy property to put the building on, as it would be unreasonable to assume that the Legislature intended for the county to construct a building on property which it did not own or lease.

"Public Funds can never be expended unless there is expressed or necessarily implied authority for the expenditure."

Quarterly Report of Attorney General, Vol. IX, p. 145;

Quarterly Report of Attorney General, Vol. I, p. 304.

In answer to your second question, in my opinion you are correct in including the number of words in the filing or recording certificate, in calculating the recording fee on conveyances and other instruments recorded in your office. In the case of **Tillman vs. Wood,** 58 Ala. 578, our Supreme Court in 1877 held:

> "Registering a conveyance in the probate office is an entirety—comprehending the body of the conveyance, the probate acknowledgement if any, the endorsement of the day received for record, and the certificate of registration—for which service the statute fixes the compensation at twenty cents per hundred words. There is no statute authorizing a charge of a separate and additional fee for the certificate of registration. The above compensation is for the whole act."

This case was construing Section 2148 of the 1876 Code of Alabama, which provides as follows:

> "Section 2148.—**Books kept for recording, and mode of recording.**—Judges of such court are to procure, at the expense of their counties, large and well bound books, in which must be recorded, in a fair hand, word for word, conveyances of property, with the acknowledgements, proofs, schedules, plats, surveys, &c, belonging thereto; and at the foot, or in the margin of the record of each conveyance, the day of the month and year of the delivery of the same for record, must be specified. The judge making the record of any conveyance must certify on the same when it was received and recorded; and in what book and page or pages the same is recorded; and must deliver it to the party entitled thereto, or his order, on the payment of the fees of registration; but the probate judge may refuse to endorse 'filed' on any conveyance, or to record the same, until such fees of registration are paid."

You are now acting under Act No. 131, H. 107, approved July 1, 1927 (General Acts, 1927, p. 89), which provides as follows:

> "6855. **Books Kept for Recording, Mode of Recording.**—Judges of Probate are to procure at the expense of their counties, large and well-bound books, in which must be recorded in a fair hand, or by printing the same, or by the use of a typewriter, or other writing or printing, photography or photostat machine, word for word, conveyances of property and all other instruments authorized to be recorded, with the acknowledgements, proofs, schedules, plats, surveys, etc., belonging thereto; and at the foot, or in the margin of the record of each conveyance or other instrument, the day of the month and year of the delivery of the same for record must be specified. The judge making the record of any conveyance or other instrument must certify on the same when it was received and recorded, and in what book and page the same is recorded, and must deliver it to the party entitled thereto, or his order, on the payment of the fees of registration; but the judge of probate may refuse to indorse 'filed' on any conveyance or other instrument, or to record the same, until such fees of registration are paid, and unless the conveyance or other instrument is witnessed, probated, or acknowledged as required by this Code."

You will note that the sections above quoted are practically the same with the exception that the last section provides different methods of recording the instruments and includes all other instruments authorized to be recorded.

The **Tillman case,** supra, answers your question as to including the number of words in the filing or recording certificate in recording conveyances in your office. In my opinion by analogy this case also answers your question as to including the certificate in recording other instruments in your office.

The premises considered, it is, therefore, my opinion that you are correct in including the number of words in the filing or recording certificate in calculating the recording fee on conveyances and other instruments recorded in your office.

The opinion of this office, under date of February 20, 1931, to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, is hereby overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 19, 1941.

Hon. John H. Campbell,
Tax Assessor,
DeKalb County,
Fort Payne, Alabama.

Where land has been sold for taxes and bid in by the State, such lands should not be assessed for taxation until it has been redeemed or sold by the State.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of February 3, 1941, which is as follows:

"In June 1939, the following real estate, the SE NE Sec. 36 tp 7, R 8, sold to the State for 1938 taxes under the assessment of C. P. Killan and G. H. Jacoway, and up to the present time it has not been redeemed. In the meantime Mr. Killian has died, but his widow, Mrs. Lou Killian, came to my office to make an assessment on the above real estate.

"I refused to accept the assessment, but advised Mrs. Killian to redeem the property from the State. At a later date she presented me with a clipping from a Birmingham paper which stated that the Supreme Court had ruled on a similar case appealed from the Jefferson County Circuit Court in a suit against Basil M. Clark.

"Please advise me if Mrs. Killian would have been entitled to have made her assessment."

In a subsequent letter you advise me that the property under consideration was formerly owned by Mrs. Killian's husband, and was mortgaged to the Federal Land Bank, who foreclosed the mortgage. Mrs. Killian bought the property at the mortgage sale. You further state that subsequent to the mortgage sale the property was sold to the State under the assessment of C. P. Killian for unpaid State taxes.

In my opinion, you were correct in refusing to allow Mrs. Killian to assess the property, in view of the fact that the same had been purchased by the State at a tax sale.

This conclusion is not in conflict with an opinion rendered by this office under date of January 24, 1941, to Hon. Roy Johnson, Tax Assessor, Jefferson County, wherein it was held that a Tax Assessor must assess property to any person returning the same for assessment and demanding that such property be assessed to him, regardless of the fact that such property may have been previously returned by, and assessed to, another. That opinion did not in any way deal with property which had been bought in by the State at a tax sale. The opinion was based on the decision of the Supreme Court of Alabama in the case of **State ex Rel Matson v. Laurendine,** 199 Ala. 312, 74 So. 370.

In my opinion your question is definitely answered by the last sentence of Section 232 of the General Revenue Act of 1935 (Act No. 194 H. 324, approved July 10, 1939, General Acts 1935, page 256, 357), which is as follows:

"Lands bid for the State shall not thereafter be assessed except as herein provided until the same have been redeemed or sold by the State."

I also call your attention to the fact that in the Laurendine case, supra, the Supreme Court recognized a distinction as to the duties of a Tax Assessor between cases where property has not been sold to the State for taxes and cases where the property has been sold. It was there held as follows:

"It could be conceded for the purposes of this case only, that when property is sold for taxes, under said Code provision, and bid in by the State, and not redeemed, but still held by the State, it need not be further assessed, yet such concession would avail nothing, as these provisions are without application to the instant case, this property having been sold by the State. Upon such sale by the State it is clearly the Assessor's duty to enter the property on his lists for assessment."

As I have heretofore pointed out, the facts as detailed in your communications to this office are in no wise similar to those contained in the Laurendine case, supra, and in the opinion rendered by this office to Hon. Roy Johnson, Tax Assessor, Jefferson County, under date of January 24, 1941, a copy of which opinion is herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 20, 1941.

Hon. John J. Flowers,
Tax Assessor,
Montgomery County,
Montgomery, Alabama.

Taxation—Bottlers—

The term "stocks of goods, wares and merchandise" as used in Section 10 (d), Revenue Act, 1935, includes the stock of bottlers of wines, soft drinks, and other similar commodities.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of February 17, 1941, in which you request my official opinion, is as follows:

"Will you kindly render your opinion if the term 'stock of goods, wares and merchandise' includes the stock of bottlers of wines, soft drinks and other similar commodities."

In a telephone conversation you advised that the above inquiry pertains to Section 10(d) of the Revenue Act of 1935. You also advised that the contention is advanced by the bottlers that they are not subject to said Section 10(d) in view of the fact that they pay regular license fees for which they are liable, and in the case of bottlers of wines a mark-up is charged the purchasers of wine when same is purchased through the Alcoholic Beverage Control Board stores.

Section 10(d) of the 1935 Revenue Act provides in pertinent part as follows:

"The subjects of taxation, except as exempted by law, shall be as follows: * * * (d) All stocks of goods, wares and merchandise, the assess-

ment to be on the average amount on hand during the preceding year, etc. * * *"

The term "stocks of goods, wares and merchandise" as used in the above quoted section, in my judgment, is applicable to the stock of bottlers of wines, soft drinks, or other similar commodities. I am unable to find any provision of law which would exempt bottlers from the provisions of this section.

The fact that said bottlers pay regular license fees for which they are liable does not exempt them from the payment of the ad valorem tax which is provided for in Section 10(d), supra. Likewise, the fact that in the case of bottlers of wine and wine is marked up by the A.B.C. stores, when purchase is made through said stores, would not exempt said bottlers from the payment of said ad valorem taxes. Such does not amount to double taxation.

To constitute double taxation in the prohibited sense, the second tax must be imposed on the same property for the same purpose by the same state or government and during the same taxing period. **61 Corpus Juris 137.**

In the instant case the license fee payable by the bottlers is a license or excise tax, while the tax chargeable under Section 10(d) is an ad valorem tax. The mark-up by the A.B.C. stores is in no sense an ad valorem tax on the wine.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 20, 1941.

Hon. W. P. Tartt,
Register, Circuit Court,
Sumter County,
Livingston, Alabama.

Registers in Chancery—Registers of the Circuit Court—Costs and Fees—

Register entitled to fee for filing vouchers required under Section 10406, Code 1923, to be filed by a trustee for accounting in the administration of a trust created for payment or security of debts (Code, 1923, Sections 10391-10412), and in all other instances where on accounting before him vouchers are expressly required by statute to be filed.

Otherwise, no filing fee is allowed for filing vouchers upon settlement of a trust.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of February 7, 1941, follows:

> "Please advise me at your **very earliest** on the foregoing. Where I get a fee on examining each voucher in the settlement of Trust Funds, are these same vouchers to be counted as papers filed and get the additional fee for filing them with all other papers in the case?"

Rule 81 of Alabama Equity Rules, effective January 1, 1940, (238 Ala. XVII) reads in part as follows:

> "All accounts taken by the register or other person acting as master shall be in the form of debtor and creditor, and the vouchers must be so numbered as to correspond with the numbers on the account * * *."

I find no requirement of law that the vouchers produced upon such an accounting, in addition to being numbered, as required by this rule, must also be filed, except as hereinafter noted. Such vouchers constitute a part of the account, being numbered to correspond with the numbered items thereof.

For the register's services in **examining** each such voucher accompanying the account of a receiver, trustee, or other fiduciary, such as an administrator, executor or guardian, "making settlement of trust before him," a fee of ten cents is expressly prescribed by Section 7283 of the Code of Alabama, 1923.

Section 7276 of said Code provides as follows:

> "Clerks, sheriffs, and other officers in this chapter named are entitled to receive, for the services therein mentioned, the fees to such services respectively annexed, and **no more**; to be taxed, paid, and collected in the manner directed by the provisions of this Code." (Emphasis supplies)

Section 7283 of said Code, in pertinent part, reads:

> "Registers are entitled to the following fees for the following services:
>
> "Filing each bill or **other paper required by law to be filed:**.....$ **.10.**" (Emphasis supplied)

Inasmuch as there is apparently no provision of law requiring vouchers produced before the register in support of an account to be filed, except as hereinafter noted, while, on the other hand, there is express provisions to compensate him for **the examination of such vouchers,** I am driven to the

conclusion that he is not authorized to charge a fee for filing such vouchers, in addition to the "examination" fee except as hereinafter stated. The expression of the one thing excludes the other.

The words, "other paper required by law to be filed," above quoted from Code Section 7283 evidently refer to pleadings and all other papers expressly required by statute to be filed, and so endorsed, during the course of a suit or other proceeding in equity, including such vouchers as are **expressly** required to be filed. This conclusion is supported by the fact that specific fees are fixed for issuing process, entering orders and decrees, and the numerous other detailed services rendered in the discharge of the register's duties.

The statute regulating administration of express trusts for the payment or security of debts (Code 1923, Sections 10391-10412) expressly requires the trustee to **file** with his account upon all settlements "the vouchers on which he relies to sustain such credits."

In this instance alone, so far as I can ascertain from Chapter 352 of the Alabama Code. 1923, relating to trusts in general, is the requirement of "filing" vouchers prescribed.

It would seem to follow, therefore, that no filing fee as to vouchers may be charged except upon accounting by the trustee of a trust created to secure payment or security of debt contemplated by Code Sections 10391-10412, supra. See Section 10406 as to the filing of vouchers by the trustee.

While Alabama Equity Rule No. 81, supra, requires accounts taken by the register or master to be in the form of debtor and creditor, and vouchers accompanying the account to be numbered to correspond with numbered items of the account, yet there is no requirement that such vouchers be also filed. The account itself is, of course, filed, and the vouchers are an integral part of the account and attached, or constructively attached, thereto, by reference arising from the numbering, but there is nothing to indicate that each separate voucher, so numbered, must also be "filed." On the other hand, the statute does **expressly** provide an examination fee for each such voucher. It is reasonable to think that if the Legislature had also intended to allow an additional fee for "filing", as well as for examination, it would have **expressly** so provided.

In **Mobile County v. Williams, Judge,** 180 Ala. 639, at page 647, 61 So. 963, it is said:

> "An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and the compensation cannot be allowed unless it is conferred by a **strict construction of the language employed in the statute.**" (Emphasis supplied)

I conclude, therefore, that wherever in any statute or law it is expressly required that a voucher be "filed", the filing fee provided by Code Section 7283, supra, may be charged; otherwise, not.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Gasoline Tax—County Boards of Health—

Officers and employees of county boards of health cannot escape payment of full purchase price, including excise tax, on gasoline used by them in the performance of their official duties (Revenue Act, 1935, Schedule 156, et seq.).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 4, 1941, in which you request my opinion as follows:

"There is enclosed a letter dated March 4, 1940 directed to the State Health Officer by Miss Katherine F. Lenroot, Chief, Children's Bureau, Department of Labor, Washington, D. C., wherein instructions are given regarding deduction of federal and state taxes on gasoline, oil, automobile parts, etc. In the last paragraph you will note that the field auditors of the Children's Bureau have been instructed to take exception to any such expenditures either from state or local matching funds.

"Since the federal tax is deducted before payment to the vendor is made, the question of federal taxes does not enter into this discussion.

"The Social Security Act, under Title V, makes funds available to the various states through the Children's Bureau, Department of Labor, a part of which money is to be matched dollar for dollar by state and local funds. During the fiscal years 1938-39 and 1939-40, the two years under discussion, the travel of the personnel of the various counties was a part of this matching fund. Such personnel consisted of health officers, nurses and sanitation officers who, in the discharge of their responsibilities, travelled from place to place in their respective counties in their private

automobiles, being reimbursed at the end of each month for actual outlay in the purchase of gasoline and oil.

"It is necessary that the gasoline tax be paid by these persons or could the tax be escaped as a tax on an instrumentality of the state government?"

While it appears from your letter and that of Miss Lenroot attached thereto, that the real purpose of your inquiry is to settle a probable exception to certain expenditures of Federal matching funds made available to your department, this opinion will be directed only to the question which you ask, i. e., whether or not gasoline tax must be paid by officers or employees of County Health Departments upon gasoline bought by them for use in performing their official duties.

It is my judgment that this opinion must be so limited, for I do not see how a ruling of this office could make it mandatory upon the Federal Government to provide matching funds in the event it did not choose to do so.

If it is the rule of the Comptroller General of the United States that matching funds will not be made available to pay a State Sales tax, and if it is upon this ground alone that the exceptions will be taken, then I advise you that the State gasoline tax is not a "sales tax."

The tax is levied by Schedule 156-156.20 of Section 348 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, pages 256, 508). Under the provisions levying the tax it appears (and the Supreme Court of Alabama has so held) that the tax is an excise upon the privilege of storage.

State v. Montgomery, 228 Ala. 93, 151 So. 856.

City of Birmingham v. State, 233 Ala. 139, 170 So. 64.

Ervin v. Alabama, 80 Fed. 2d, 432, 433.

Pan-American Petroleum Corporation v. Alabama, 67 Fed. 2d. 590.

The burden of the foregoing cases is that the tax in question is imposed upon the storer of the gasoline, and not upon the sale to the purchaser. The seller, it is true, commonly includes the tax in the sale price of the gasoline, but this, in and of itself, does not constitute the purchaser the tax payer, or the tax a "sales tax," any more than does the inclusion of other taxes and costs of doing business in the sales price of the gasoline.

I have found no statutory or Constitutional provision preventing a dealer from charging, as a part of the purchase price, the amount of tax required to be paid by him, nor have I found any law prohibiting officers or employees of the county health departments from paying such tax, even though they may be acting as agencies of the State. (Quarterly Report of Attorney General, Vol. VIII, page 263).

This office has heretofore held that a county board of Education is authorized to pay the purchase price of gasoline in which is included the amount of tax imposed by a municipal ordinance upon the seller (Quarterly Report of Attorney General, Vol. XVIII, page 46, 47), and I can see no distinction between that case and the instant one.

In concluding that the tax levied by Schedule 156, et seq. of the Revenue Act, supra, is not a "sales tax," I have not overlooked the remarks of the Supreme Court of the United States in **Graves v. The Texas Company,** 298 U. S. 393. However, the pivotal point in the Graves case was that the Federal Government was immune from storage, an essential part of the sale of the gasoline, was objectionable where the sale of the gasoline was directly to the United States Government. The Court stated:

> "* * * assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing.' Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687. As held in the Panhandle Oil Co. Case (277 U. S. 222, 72 L. ed. 858, 48 S. Ct. 451, 56 A.L.R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. . . . The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the numbers of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

It is apparent from the foregoing quotation that the Graves case did not attempt to overturn the ruling of the Supreme Court of this State and the lower Federal Courts that the tax was not a "sales tax."

You are therefore advised that inasmuch as the gasoline tax here considered is imposed upon the seller and not upon the purchaser, the officers or employees of the county health departments must pay the tax included in the purchase price of the gasoline.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Jefferson County—Taxation—Costs and Fees—Judges of Probate—

1. Under Act No. 163, H. 88, approved March 20, 1939 (General Acts, 1939, p. 264), the fees collected by the Probate Judge of Jefferson County for giving notice to a delinquent tax payer and for confirming and making a report of the sale are limited to one fee against a taxpayer for each of the particular services performed, respectively, no matter how many pieces of property belonging to said taxpayer are sold.

2. Under Section 270, Revenue Act of 1935, the redemption fee collected by the Probate Judge is limited to each redemption made.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 21, 1940, in which you request my official opinion as follows:

"Please advise me whether or not under Section 9 of the Act of the 1936 Legislature, page 205, as amended by Act of the 1939 Legislature, page 264, the twenty-five cents fee for confirming and making a report of sale should be charged against each separate piece of property assessed and sold for taxes belonging to one owner, or whether or not only one fee should be charged against each owner, regardless of the number of pieces of property assessed and sold for taxes.

"Also, please advise me whether or not in the case of the redemption by an owner of several pieces of property sold for taxes for the same tax year under the above Act, as amended, the fifty cents fee provided for in Section 270 of the 1935 Revenue Bill, should be charged against each owner, regardless of the number of pieces of property redeemed on the same day."

In reply, I wish to refer you to Section 1 of Act No. 163, H. 88, approved March 20, 1939 (General Acts of 1939, page 264), which amends Sections 8 and 9 of Act No. 176, S. 117, approved April 21, 1936 (General Acts, 1936, page 205), which said act is commonly referred to as "Unit System of Assessment Act," and which at the present time affects Jefferson County only. The pertinent part of the above cited 1939 act provides as follows:

"For notice to each delinquent property owner to show cause why a decree of sale should not be rendered against the property assessed to him, the Probate Judge is entitled to a fee of twenty-five cents, and the Tax Collector shall be entitled to a fee of twenty-five cents for making sale against each person whose property was sold for taxes, and the Judge of Probate shall be entitled to a fee of twenty-five cents for confirming and making a report of said sale, but no other fee shall be charged by the Tax Collector or Probate Judge."

It is my opinion that the Probate Judge should collect only one fee of 25c from each delinquent property owner regardless of the number of pieces of property assessed. It will be noted that under the provisions of Section 1, supra, the Probate Judge is entitled to a fee of 25c for notice to each delinquent property owner to show cause why a decree of sale should not be rendered against the property assessed to him, which indicates that the Legislature did not intend that a notice be issued for each separate piece of property assessed, but that one notice directed to the delinquent tax payer to appear and show cause why the decree for the sale of property belonging to him should not be made is sufficient. See Quarterly Report Opinions of Attorney General, Vol. XIX, page 275.

For like reason the Probate Judge is entitled to a fee of 25c for confirming and making a report of the sale of the entire property assessed to a single owner, and not on each separate piece of property assessed.

In answer to your second question, I call your attention to Section 270 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, pages 256, 370), which provides in pertinent part as follows:

"In all redemptions of land from tax sales, the party, securing the redemption shall pay all costs and fees as herein provided for due to officers and a fee of fifty cents to the judge of probate for his services in the matter of redemption."

It is my opinion that the Probate Judge should charge a fee of 50c for each redemption made. For example, if a person assessing several pieces of property under one assessment should redeem one piece from the assessment so made on several pieces of property, the fee would automatically attach to the particular redemption made, and incidentally would attach to each subsequent redemption made from the single assessment of several pieces of property. If the entire lot of several pieces of property be redeemed at one time, then, and in that event, only one fee of 50c should be charged by the Probate Judge for such redemption.

Nothing herein above set out should be construed as holding that the Probate Judge of Jefferson County would be entitled to the fees in question personally, as said question is not presented in this request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Hon. H. M. Hughes,
Circuit Court Clerk,
Madison County,
Huntsville, Alabama.

1. Grand Juries—

Deputy sheriffs should not be allowed to examine the grand jury docket.

2. Sheriffs—Seizure Fee—

Where seizure of an amount of whiskey less than one gallon is made without a search warrant, no seizure fee is provided.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of February 6, 1941, is as follows:

"The Sheriff's deputies want access to the Grand Jury Docket, they claim that by knowing the defendants on the Grand Jury Docket, it makes it easier for them to summon witnesses to appear before the Grand Jury.

"My instructions from the State's Assistant Examiner of Public Accounts, was for me to keep the Grand Jury Docket locked up and no one to have access to it except the Circuit Clerk and Solicitor. I will greatly appreciate your rendering me an opinion promptly in order that I may know just how to handle same.

"Also please render an opinion as to whether or not when an arrest is made by the Sheriff for violating the prohibition law, and less than one gallon of whiskey is seized without a search warrant, is the Sheriff entitled to $3.00 seizure fee?"

In this State the investigations, deliberations and actions of a grand jury are surrounded by secrecy. The reason for this is the ease with which escape could be made by anyone against whom an indictment was returned if the proceedings were conducted publicly. 28 C. J. (Grand Juries), page 812.

This policy of the law is evidenced in Alabama by Section 8690 of the Code of Alabama, 1923, which makes it a misdemeanor punishable by a heavy fine and hard labor for any officer of the court or grand juror to disclose the fact that an indictment has been found until the defendant has been arrested or has given bond. Section 8690 provides as follows:

"8690. **Disclosure of indictment by officer or grand juror.**—Any judge, solicitor, clerk, or other officer of court, or grand juror, who discloses the fact that an indictment has been found, before the defendant has been arrested, or has given bail for his appearance to answer thereto, must, on conviction, be fined not less than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months."

It is my opinion that in order to secure this secrecy you should not allow anyone to see the grand jury docket other than the solicitor and the circuit judge. I know of no duty that is placed upon deputy sheriffs to secure witnesses to appear before a grand jury other than to serve summons on those witnesses issued by you at the instance of the solicitor.

In answer to your inquiry concerning seizure fee of a sheriff when **not** acting under a **search warrant,** and when the amount of whisky seized is **less** than **one gallon,** it is my opinion that he is entitled to no seizure fee at all.

Section 4654 of the Code of Alabama, 1923, which provides for seizure fees in cases where the seizure is made without a search warrant, provides as follows:

"4654. **Fees to be taxed for arrest and seizures in prohibition cases.**—When an officer arrests any person in possession of an unlawful quantity or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, then on the conviction of such party of a violation of a city ordinance or state law, whether in the recorder's court, or state court possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed up against the defendant, and paid to such officer as a part of the cost of the case as follows: If a seizure is made of not less than one gallon, nor more than five gallons of such liquors, the fee shall be three dollars; if the seizure be of more than five gallons, and less than twenty gallons, the fee shall be five dollars; and if more than twenty gallons, be seized, the fee shall be ten dollars."

Therefore, the premises considered, you are advised that where the seizure is made without a search warrant, and the amount of whisky seized is less than one gallon, there is no seizure fee authorized by law. Opinion of the Attorney General, rendered under date of July 15, 1939, to Hon. D. L. Rosenau, Jr., Judge Municipal Court, Limestone County (Quarterly Report, Vol. XVI, page 43). I am enclosing a copy of this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
THE CAPITOL.

Section 140 of Act No. 194, H. 324, approved July 10, 1935 (1935 Revenue Act, General Acts, 1935, pp. 256, 324), does not apply to persons operating aeroplanes for the purpose of transporting passengers, property or United States mail.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your request for official opinion, which is as follows:

"Will you please advise if the two mill gross receipts tax levied by Section 140, Article 5, House Bill 324, General Acts 1935, approved July 10, 1935, should be paid on intrastate gross receipts from carrying passengers, property, United States Mail, by persons operating aeroplanes."

Section 140 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, pp. 256, 324), is, in pertinent part, as follows:

"Section 140. For each person, operating a public utility, such as street railroad or interurban railroad operated by electricity or other motive power, water works, gas company, pipe lines company for transporting or carrying gas, oil, gasoline, water or other commodities, gas distributing companies whether by means of pipe line or by tanks, drums, tubes, cylinders or otherwise, heating companies or other public utility, except electric, hydro-electric telephone or telegraph companies, railroad or sleeping car companies and express companies, which are otherwise licensed shall pay to the State a license tax equal to two mills on each dollar of gross receipts of such public utility in this State for the preceding year.* * *"

In my opinion the two mill gross receipts tax levied by the above quoted section does not apply to persons, firms, or corporations operating aeroplanes for the purpose of transporting passengers, property, or the United States mail, even when such operations are confined to intra-state business.

It is to be noted that the above quoted provision does not specifically include the operators of air transportation companies, and, if such companies are to be brought within the purview of said section, the words "other public utility" as used therein must be construed to include such companies.

Construing the words "other public utility" in the light in which those words are used in said section, I do not believe that it was the legislative intent that they include the operation of an air transportation company.

It is a known fact that air transportation companies have been operating in this State for the last several years, No effort has heretofore been made to collect such a tax, and, in fact, one or more sessions of the Legislature have intervened since such operations commenced and no effort has been made to in any way change the administrative construction which has heretofore been placed on Section 140, supra.

I refer you to the cases of **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones**, 236 Ala. 370, 182 So. 452; **Marie Walker Jones v. Roy Johnson, Tax Assessor**, (MS), which cases deal at length with the weight which the courts have given administrative construction.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Dr. Douglas L. Cannon,
Director of County Organization,
State Department of Public Health,
Montgomery, Alabama.

County Boards of Health—

The County Boards of Health have no authority to acquire or hold title to real estate.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of January 28, 1941, is as follows:

"Please give me an answer to the following question: Can a county board of health legally hold real estate in its own name?

"The matter has come up in connection with some of the activities of the Jefferson County Board of Health, hence the inquiry."

The Legislature, in the exercise of the police power reserved to the sovereign State, has enacted an elaborate system of health laws, and for the purpose of their administration has created a State Board of Health and County Boards of Health for each of the counties. The authority and jurisdiction of the State Board of Health and that of the County Boards of

Health are defined in Sections 1051 and 1052 of the Code of Alabama, 1923, as amended. These Sections fail to confer power or authority on the County Boards of Health to acquire or hold title to real estate. The Board being a creature of the Statutes, its powers and jurisdiction are not to be presumed, but must be found in the letter of the statute. It follows that your question must be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Hon. T. C. Garner,
Treasurer, Jefferson County.
Birmingham, Alabama.

Expenditures from County General Fund—Juvenile Courts—

Secretary of State should furnish Judge of the Juvenile & Domestic Relations Court of Jefferson County copies of the Alabama Reports. It is within the discretion of the county governing body of Jefferson County to purchase books for said court and pay for the same out of the General Fund of the County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion bearing date of January 31, 1941, follows:

"There is to be presented to Jefferson County a claim amounting to approximately $150.00 for Alabama Reports and other books of such nature, for use in the office of the Judge of the Juvenile and Domestic Relations Court of Jefferson County.

"After carefully reviewing the opinions of your office, and the Code and Acts, I am unable to find where such a claim would be a legal payment by Jefferson County.

"It has been my understanding that the Code, Acts, and Opinions of your Office were free and available to the offices entitled to them and inasmuch as I have been unable to find an Act or Opinion authorizing payment for Alabama Reports, etc., it would be appreciated if you will let me have your opinion at your earliest convenience."

In my opinion the Secretary of State should furnish the Judge of the Juvenile and Domestic Relations Court a copy of the Alabama Reports for use in his office, as he is a Judge of a court of record. Sections 10341-10342 of the 1923 Code of Alabama provide as follows:

"10341.—**Proprietorship and copyright of reports.**—The state retains the proprietorship of the reports and the exclusive right to publish the same; and the governor must copyright each volume for the benefit of the state."

"10342.—**Distribution of reports.**—Of the copies of the reports delivered to the secretary of state, there must be distributed to the governor, the judge of any court of record (except county commissioners), the attorney-general, the reporter, the circuit judges, solicitors, and United States district judges and district attorneys in this state, one copy each, which must be delivered to their successors in office respectively, or returned to the secretary of state; also six copies to the University of Alabama, for the use of the law department, four copies to the supreme court library, and one copy each to the department of justice of the United States and the United States circuit court of appeals for the fifth circuit."

Sections 1 and 5 of Act No. 478, H. 958, approved September 13, 1935, (General Acts 1935, p. 1012), provide as follows:

"Section 1. That in each and all counties of this state which now have a population of two hundred thousand people, or more, according to the last Federal census or which shall hereafter have such population, or more, according to any such census hereafter taken, there shall be and there hereby is created and established a court to be designated the Juvenile and Domestic Relations Court, which courts **shall be courts of record,** and said courts shall have and exercise all power, jurisdiction and authority which is herein or which shall hereafter be conferred on such courts."

"Section 5. The County Commission or other governing body exercising similar powers, of each and every county in which a Juvenile and Domestic Relations Court is established by this Act shall provide for such court in its respective county, convenient and suitable quarters in which said court may transact its business; and it shall be the duty of such County Commission or governing body, and it shall have full authority to do any and all things **which it may deem necessary or helpful** to the successful operation of such court, and to carry out the purposes and intent for which it is created." (Emphasis supplied)

You are correct in your understanding that the Code, Acts, and Reports of this office are free and available to the officers entitled to them. See Act No. 650, S. 498, approved July 10, 1940, (General Acts, 1939, p. 1023); Act No. 274, S. 213, approved Nov. 4, 1932, (General Acts, 1932 Extra Session p. 277; Act No. 50 H. 225, approved February 21, 1939, (General Acts, 1939, p. 57).

If copies of the Alabama Reports and other necessary books are not available, and the county governing body of Jefferson County is of the opinion that it would be helpful to the successful operation of the Court for the Judge to have these books, then, in my opinion, the county governing body may purchase the books for the Judge and pay for the same out of the general funds of the county. See Section 5 of Act No. 478, quoted supra.

I refer you to an opinion of this office to Hon. A. R. Forsyth, Director of Finance, State of Alabama, dated July 22, 1940, (Quarterly Report of Attorney General, Vol. XX, p. 104), which holds that the words "other necessary equipment" as used in Act No. 648, Senate Bill 444, approved July 10, 1940, includes whatever things are proper, useful and suitable to the office of the solicitor, in the discharge of the duties imposed upon him by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941.

Hon. William G. Lindsey,
County Solicitor,
Washington County,
Chatom, Alabama.

Jury Board--Draft Board Clerks, member of—

Chief Clerk of local Draft Board cannot legally serve as a member of the Jury Commission.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your request for official opinion under date of January 21, 1941, is as follows:

"Will you kindly give me your opinion on the following question?

"Can the Chief Clerk of Local County Draft Board, legally serve as a member of County Jury Board, at the same time."

I am of the opinion that your inquiry should be answered in the negative.

Act No. 59, S. 55, approved March 2, 1939, General Acts of 1939, page 86, provides for the establishment of a Jury Commission in all counties of the

state. I assume that you have in mind service on the Jury Commission of Washington County in phrasing your question.

Section 2 of Act No. 59, supra, reads as follows:

"Section 2. That each of said Jury Commissions shall be composed of three members who shall be qualified electors of the County in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. **Members of the Commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the Federal, State, County or Municipal government, which carries with it any compensation whatsoever.**" (Emphasis supplied)

The disqualification set out above is very broad and all inclusive. It is not confined to those who perform any duties under the Federal, State, County or Municipal government which carries with it any compensation whatsoever. The Chief Clerk of a County Draft Board clearly comes within this qualification, since he is performing a Federal duty for which he receives compensation (Act of Congress, No. 783, S. 4164, approved September 16, 1940, known as the Selective Training and Service Act of 1940).

I am of the opinion, therefore, that a person who is the Clerk of a local County Draft Board cannot legally serve at the same time as a member of the Jury Commission. Cf. Opinion to Hon. Fleetwood Rice, Judge of Probate, Tuscaloosa County, under date of October 7, 1935, Biennial Report of Attorney General, 1934-1936, page 323; opinion to Hon. C. W. Cunninghame, Clerk, Jury Commission, under date of February 9, 1927, Biennial Report of Attorney General, 1926-1928, page 98; opinion to Mayor of Castleberry, Alabama, under date of February 5, 1929, Biennial Report of Attorney General, 1928-1930, page 165.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1941

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Section 140 of Act No. 194, H. 324, approved July 10, 1935, General Acts 1935, pages 256, 324, does not apply to persons operating motor bus or other motor vehicle carrying passengers for compensation and operating over fixed routes within incorporated towns and adjacent territories.

Opinion by the Attorney General.

Dear Sir:

I have your letter requesting my opinion as follows:

"Will you please advise whether or not in your opinion the two mill gross receipts tax levied by Section 140, Article 5, of House Bill 324, General Acts 1935, approved July 10, 1935, should be paid on the gross receipts of persons operating motor buses or other motor vehicles carrying passengers for compensation and operating over fixed routes within incorporated towns and adjacent territory, rendering an urban and interurban service similar to that of street railroads."

Section 140 of Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, pages 256, 324, is in pertinent part as follows:

"For each person, operating a public utility, such as street railroad or interurban railroad operating by electricity or other motive power, * * * * or other public utility, except electric, hydro-electric telephone or telegraph companies, railroad or sleeping car companies and express companies, which are otherwise licensed shall pay to the State a license tax equal to two mills on each dollar of gross receipts of such public utility in this State for the preceding year. * * * *"

In my opinion the two mill gross receipts tax levied by the above quoted section does not apply to persons, firms or corporations operating motor buses or other motor vehicles carrying passengers for compensation and operating over a fixed route within incorporated towns and adjacent territory.

It is to be noted that the above quoted provision does not specifically include such operations and if such transportation companies are to be put within the purview of said section, the words "other public utility," as used therein, must be construed to include such companies.

It is my information that the Department of Revenue or its predecessor has never considered such operations to come within the purview of Section 140, supra. It is generally agreed that such bus operations have been prevalent in this state for a long period of time. Several sessions of the Legislature have met and have not seen fit to in any way change the administrative construction placed on said Section 140.

I am, therefore, of the opinion that the cases of **State v. H. M. Hobbie Grocery Company,** 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones,** 236 Ala. 310, 182 So. 452; and **Marie Walker Jones v. Roy Johnson, Tax Assessor,** (MS), are authority for the position taken in this matter. I

believe that the courts would follow the law laid down in the above cited cases if the State should attempt by litigation to collect the gross receipts tax from such motor transportation companies.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 24, 1941.

Hon. Howard Kirby, Clerk,
Circuit Court, Etowah County,
Gadsden, Alabama.

Costs and Fees—Solicitors—Fine and Forfeiture Fund—

Under Section 3669, Code of Alabama, 1923, surplus in solicitor's funds is transferred to fine and forfeiture fund at end of fiscal year. Present surplus cannot be used to compensate fine and forfeiture fund for amounts which should have been, but were not, so transferred heretofore.

Opinion by the Attorney General.

Dear Sir:

I have your letter of January 9, 1941, in which you request my official opinion as follows:

"Please render to me your opinion as to Section 3669 of the Criminal Code of 1923. Under this section it appears that the surplus money after payment of County Solicitor's salary should go into the Fine and Forfeiture Fund of the County. If this is correct, then please advise me how far back does this section operate. In other words, does this section become operative from the date of its approval?"

Section 3669, Code of Alabama, 1923, is as follows:

"3669. Surplus paid to fine and forfeiture fund.—The surplus money paid into the state and county treasuries arising from the solicitor's fees after the solicitors and their assistants have respectively been paid the amounts allowed them by law, shall be paid into the fine and forfeiture fund of the respective counties in direct proportion to the amount received from the convictions respectively."

The above quoted provision has been on the statute books of this State since the day on which the Code of 1907 went into effect.

At the end of each fiscal year since that time any surplus which might have existed in the "solicitor's fund" of the State or County Treasury should have been remitted to the fine and forfeiture fund of the several counties of the State in the manner provided in the quoted section. Quarterly Report of Attorney General, Volume VII, page 32; Biennial Report of Attorney General, 1930-1932, page 716.

If this has not been done, however, I do not believe that the funds presently in the "solicitor's funds" could now be used to compensate the fine and forfeiture fund for amounts which should have been transferred to it heretofore.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 26, 1941.

Hon. Rayburn J. Fisher,
Superintendent of Education,
Tuscaloosa County,
Tuscaloosa, Alabama.

Schools—County Boards of Education—Insurance—

(1) County Boards of Education have implied authority to procure "Fire and Theft" and "Fifty dollars deductible" (collision) insurance on trucks and school busses owned by the County Boards and used for school purposes.

(2) The premiums for such insurance may be paid out of the County Boards' general funds, or the district tax funds, provided the motor vehicles are used only in the district or districts, the funds of which are used to pay such premiums.

(3) County Boards of Education do not have authority to pay for property damage and liability insurance on their motor vehicles.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion dated January 2, 1941, is as follows:

"Will you please advise me whether or not County Boards of Education can legally pay out of their general funds, or out of their district tax funds, for the following kinds of insurance on trucks that they own

and use in maintaining school buildings; and also on County-owned school buses:

"1. Fire and theft.

"2. Fifty dollars deductible.

"3. Property damage and liability."

I assume from your letter of inquiry that the trucks and busses therein referred to are owned by the County Board of Education of Tuscaloosa County and are used for school purposes.

Upon that assumption, it is my opinion that your County Board of Education has implied authority to procure "fire and theft" and "Fifty dollars deductible" (collision) insurance on such trucks and busses. It is further my opinion that the premiums for such insurance may be paid out of the County Board's general funds, or the district tax funds, provided the motor vehicles are used only in the district or districts, the funds of which are used to pay such premiums. Such insurance policies would protect this property of the County Board of Education from loss or damage by fire, theft or collision, and would enable the board to promptly replace any such property so lost or damaged.

Section 86 of the Alabama School Code of 1927 reads, in pertinent part, as follows:

"Section 86. County Board of Education.—The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education. * * *"

Section 95 thereof provides as follows:

"Section 95. Property Vested in County Board.—All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any County for the benefit of the public schools of any County, hereby transferred and vested in the County Board of Education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular County, school district, or public school, shall be held in trust by the County Board of Education for the benefit of any such county school district or school."

Section 132 thereof provides, in pertinent part, as follows:

"Section 132. Powers of County Board.—The County Board of Education shall have the right to acquire, purchase, or by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. * * *"

These sections, in my opinion, vest the County Board of Education of your county with implied authority to procure such insurance on such trucks and busses owned by it and to pay the premiums on such insurance in the manner hereinabove indicated. In this connection, I quote as follows from the opinion of the Supreme Court in the case of **Hughes v. Hartford Accident & Indemnity Co.,** 223 Ala. 59, 134 So. 461:

> "As said in State ex rel. Priest v. Univ. Wis., 54 Wis. 159, 11 N. W. 472, a case cited in Bryant v. Whisenant, supra: 'Implied power is an incident of general power granted, and is peculiarly applicable to corporations governed by boards of regents, trustees, directors, and the like.'"

To like effect is the following excerpt from the opinion of the court in the case of **State ex rel. Ellis v. Griggs,** 227 Ala. 681, 151 So. 850:

> "It seems to be well settled that, in addition to powers expressly conferred upon a public officer, he has by implication such powers as necessary for the due and efficient exercise of those expressly granted."

Cf. Opinion in Biennial Report, Attorney General, 1926-28, page 609.

In my opinion your inquiry as to "property damage and liability" insurance should be answered in the negative. This office, in an opinion to Hon. E. W. Pettus, President, Dallas County Board of Education, Selma, Alabama, under date of December 30, 1933, Biennial Report, Attorney General, 1932-34, page 458, held that County Boards of Education do not have authority to pay for liability insurance on school busses. The reasoning of this opinion is equally applicable to "property damage" insurance. Both liability and property damage insurance are for the purpose of protecting the insured from pecuniary loss arising in tort. Since County Boards of Education are not liable for the negligent or tortious acts of their agents or employees, they could not suffer any pecuniary loss arising from any such act of their agents or employees. **White vs. Alabama Insane Hospitals,** 138 Ala. 479, 35 So. 54; **Alabama Girls Industrial School v. Reynolds,** 143 Ala. 579, 42 So. 114; Quarterly Report, Attorney General, Vol. VI, page 66.

It is, therefore, my opinion that your County Board of Education does not have authority to pay the premiums on "property damage and liability" insurance on its motor vehicles.

Nothing in the opinion in the case of **Hughes v. Hartford Accident & Indemnity Co.,** supra, as I read the same, militates against this conclusion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. G. C. Brittain, Secretary,
Board of Revenue, Calhoun County,
Anniston, Alabama.

Calhoun County—Judge of Probate—

Chief Clerk in Judge of Probate's Office not entitled to salary of Judge of Probate during vacancy in said office.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion, bearing date of January 21, 1941, is as follows:

"Your kindness in rendering an official opinion in the following matter will be appreciated.

"Lewis P. Gray, Chief Clerk in the Judge of Probate Office has filed claim with the Board of Revenue of Calhoun County, claiming for himself the salary of the Judge of Probate for the period from December 27, 1940 to January 6, 1941, during which time there was a vacancy in the office of Judge of Probate caused by the death of Hon. Thomas W. Coleman on December 27, 1940. A new Judge of Probate was appointed by the Governor and assumed the duties of the office on January 6, 1941.

"Calhoun County is now governed by House Bill No. 399 by Merrill, approved August 11, 1939.

"Is it your opinion that the Chief Clerk is entitled to receive the salary of the Judge of Probate during the time he was in charge of the office?"

In my opinion your inquiry should be answered in the negative.

The local act referred to by you, affecting the office of the Judge of Probate of Calhoun County, namely Act No. 219, H. 399, approved August 11, 1939, (Local Acts, 1939, 122), fixes the salary of the Judge of Probate and allows him a specified amount for clerical assistants. This act does not specifically fix the salary or duties of the Chief Clerk in the office of the Judge of Probate. In fact, a Chief Clerk is not specifically mentioned therein.

Therefore, in order to answer your inquiry it will be necessary to consider the statutes dealing generally with chief Clerks in offices of Judges of Probate.

Section 9594 of the Code of Alabama, 1923, reads as follows:

"Section 9594. **Chief Clerk continues to perform duties of office pending vacancy, etc.**—Whenever a vacancy shall occur in the office of the judge of probate, the chief clerk in that office, appointed and qualified as authorized by law, shall, during such vacancy and until the qualification of a lawful successor, perform all the duties of that office which he is authorized by law to perform when there is no vacancy, but must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the court. He may make all necessary orders for the continuances of causes and proceedings pending in the court. All such duties are to be performed, during such vacancy, by such chief clerk in his own name as clerk of the probate court, and he is entitled to the lawful fees therefor. For his official acts hereunder, such chief clerk and the sureties on his bond to the judge of probate, shall be liable to persons injured, according to the legal effect of official bonds as declared by statute. If such chief clerk shall fail or refuse on demand to deliver all the books, papers, property, and money belonging or appertaining to such office, to the lawfully qualified successor of the judge of probate, he may be proceeded against under the provisions of this Code to compel the delivery of books, papers, property, and money by public officers to successors."

If the Judge of Probate of Calhoun County were on the so-called "fee basis" instead of a salary, the Chief Clerk performing the duties of the office, by reason of vacancy having occurred in said office, would be entitled to fees received in the performance of such duties in his name as chief clerk of the Probate Court. See opinion of this office under date of December 17, 1938, to Hon. T. C. Almon, Judge of Probate, Morgan County, Decatur, Alabama, (Quarterly Report of Attorney General, Volume XIII, page 129).

In the instant case, the Judge of Probate is on a fixed salary and "all legal charges, costs, fees, compensation and allowances heretofore or hereafter authorized to be collected by him" are paid into the County Treasury. Patently, the Chief Clerk would not be entitled to any fees for performing the duties of the Judge of Probate, as all fees must be paid into the County Treasury.

It is a well settled principle of law that, "Those who accept public offices, which require them to render services to the State, must take the office cum onere—the rendition of such services gratuitously, unless, by express statutory provision, compensation is fixed, and an express liability for its payment imposed." **Torbert v. Hale County,** 131 Ala. 143, 30 So. 453, **Pollard v. Brewer,** 59 Ala. 130.

In the present case the Chief Clerk in the office of the Judge of Probate draws a monthly salary out of the County Treasury of Calhoun County, with no provision being made for any new or additional salary for him when he performs the duties of the Probate Judge by reason of a vacancy having occurred in the office of Judge of Probate.

Since there is no express statutory provisions allowing the Chief Clerk additional compensation or salary, I am constrained to hold that he renders gratuitously any additional services that may be required of him by reason of a vacancy having occurred in the office of Probate Judge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. Charles M. Cooper, Judge,
Court of Common Pleas,
Dothan, Alabama.

Arrests—Warrants—

1. Where arrest is without warrant the dating of the warrant and commitment should be of the day issued by the committing magistrate.

2. It is unnecessary that officer executing warrant of arrest have affidavit in his possession when warrant is executed. Affidavit may be detached from warrant and held in Clerk's office.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of February 14, 1941, is as follows:

"Under and by virtue of the authority contained in the provisions of Chapter 25, Article 5, Section 869, et seq. of the 1923 Code of Alabama, I, as Judge of The Court of Common Pleas of Dothan, Alabama, hereby certify for your opinion the following questions which have arisen in connection with the duties of my office, to-wit:

"(1) When an arrest is legally made without a warrant by a sheriff, highway patrolman or a private citizen and I am not presently available due to the lateness of the hour or for some other good cause and the accused is placed in jail until a warrant and commitment can be obtained, should I date the warrant and commitment as of the day the arrest is made, or, as of the date of actual issuance?

"(2) It has been the practice for many years in The Court of Common Pleas of Dothan, Alabama for the affidavit, upon which a war-

rant of arrest is issued, to be attached to the warrant and the officer have in his possession both affidavit and warrant. Is it legal for the affidavit to be detached from the warrant and to be held in the Clerk's Office until the warrant of arrest is executed and returned, or, must the affidavit of complaint be with the warrant when the warrant is executed?"

Your first inquiry has heretofore been answered by an opinion rendered by this office under date of January 12, 1932, to Hon. Arthur B. Chilton, United States Attorney, Federal Building, Montgomery, Alabama (Opinions of Attorney General, Office Edition, Vol. VIII, page 14), a copy of which opinion is enclosed for your convenience.

This opinion holds that where an arrest is made without a warrant, but within a reasonable time thereafter a warrant is sworn out, and commitment papers are executed by the committing magistrate based thereon, both the warrant and the commitment should bear the date of the execution of the same, and not be dated back to the day of the actual arrest.

In answer to your second inquiry, you are advised that it is unnecessary that the officer executing the warrant of arrest also have in his possession the affidavit or complaint. Of consequence, there can be no objection to the affidavit being detached from the warrant and being held in the Clerk's office until the warrant of arrest is executed and returned.

Sections 3261 and 3262 of the Code of Alabama, 1923, provide for arrests by officers under warrant as follows:

"3261. **What officers may make arrests.**—An arrest may be made, under a warrant, or without a warrant, by any sheriff, or other officer acting as sheriff, or his deputy, or by any constable, acting within their respective counties, or by any marshal, deputy marshal, or policeman of any incorporated city or town, within the limits of the county."

"3262. **Arrest by officer under warrant; when and how made.**—An officer may execute a warrant of arrest on any day and at any time; he must, in doing so, inform the defendant of his authority, and, if required, must show the warrant; and if he is refused admittance, after notice of his authority and purpose, he may break an outer or inner door or window of a dwelling house, in order to make the arrest."

It has been repeatedly held that an officer charged with the duties of executing process is bound to do so unless the process is void upon its face, or the court issuing it is without jurisdiction. The officer, in discharging this duty, is not bound to inform himself of the initial proceedings made the basis for the issuance of the writ. **Spear v. State,** 120 Ala. 351, 25 So. 46, Code of Alabama, 1923, Section 10197.

In the case of **Brown v. State,** 109 Ala. 70, 87, 20 So. 103, 109, Chief Justice Brickell stated the doctrine to be:

"As a general proposition, it may be stated that the officer is justified in the execution of the process when it proceeds from a court or magistrate having jurisdiction to issue it, unless invalidity appears on its face. He is not bound, and has no authority, to inquire into the regularity or legality in the proceeding prior to its issue."

It is apparent from the foregoing authorities that the officer acts upon the warrant rather than upon the proceedings which brought it into being, and it is consequently unnecessary for him to have a copy of the affidavit in his possession when executing the warrant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. D. F. Fennell, Register,
Circuit Court, In Equity,
Jackson County,
Scottsboro, Alabama.

Fees of Officers, Condemnation of Property, Seized in Transportation Cases.—

Fees of officers in condemnation proceedings of property used for manufacturing or transportation of prohibited whiskeys discussed.

Section 4782, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 26, 1940, in which you request my official opinion as follows:

"Sometime ago the Chief of Police of Scottsboro reported to the Alabama Beverage Control Officers that an automobile was regularly bringing whiskey from Tennessee into Jackson County. Sometime later on, information was obtained by the Beverage Control Officers as to the exact time a delivery of whiskey was supposed to be made by this person. This information was not furnished by the Chief of Police but came from South Pittsburg, Tennessee, from a source undisclosed to me. The Beverage Control Officers, thereupon, came up here from Huntsville and picked up the Chief of Police and one of his Deputies and went to a point beyond the police jurisdiction of Scottsboro where the City officers

had no jurisdiction as officers, and waited for the arrival of this car. Sometime after that the car appeared and was stopped and searched by the Beverage Control Officers and a considerable quantity of whiskey discovered. The man driving the automobile was arrested and brought to Scottsboro and placed in the County jail and the automobile turned over to the Sheriff of the County, who retained it in his custody until its condemnation and sale under a decree of the Circuit Court, in Equity. The question now arises in my mind as to the division of the fee allowed under the statute to arresting officers and informants in such cases of the proceeds of the sale now in my hands. I might add further that the only witnesses who testified in the condemnation case were the Chief of Police and the other city policeman who accompanied the A.B.C. officers on the raid.

I will greatly appreciate your advices as to the proper disbursement of the proceeds of this condemnation."

In answering the above request I call your attention to Section 4782, Code of Alabama, 1928 (Michie), which is as follows:

"Sec. 4782. **Proceeds of sale of contraband or forfeited property; distribution and disposition of funds.**—The proceeds of the sale of any such property forfeited to the state, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, (shall) be applied as follows: one-fourth to the officer making the seizure and furnishing the proof, but if proof be furnished by another person than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth to the officer making the seizure and assisting in the condemnation case, or who makes the sale under advertisement. The remainder of the proceeds shall be paid into the treasury of the state as a law enforcement fund to be used and applied for the enforcement of state laws under the supervision and control of the governor, same to be paid out on warrant of the auditor on a bill against the state approved by the attorney general and governor."

The arresting fee is not involved in a proceeding to condemn property used in the manufacture or transportation of prohibited liquors. This comes up on the trial of the defendant for violating the prohibition law, if and when he is convicted.

The fee for seizure and furnishing of proof is the matter under consideration.

It appears from your statement of facts and your supplemental letter of December 4, 1940, that the agents of the Alabama Alcoholic Beverage Control Board who were commissioned as highway patrolmen, with general powers of peace officers, actually made the seizure, and the police officers furnished the proof at the condemnation proceedings. In this event, as shown by Section 4782, supra, one-eighth of the proceeds would go to the furnisher of proof

and one-eighth to the officers making the seizure and assisting in condemnation. However, the amount which accrues to the Highway Patrol Officers should be remitted by you directly to the Director of Public Safety, who shall cover the same into the Highway Patrol Fund. Opinion of Attorney General to the Clerk of the Inferior Court, Mobile County, Alabama, under date of October 28, 1940 (copy enclosed).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
113 Court House,
Birmingham, Alabama.

Trusts and Trustees—Deed Filing Tax—Declaration of Trust—

Under facts stated, upon foreclosure by a corporate trustee of a mortgage or deed of trust held by it for the benefit of others and purchase at foreclosure sale of the mortgaged property and conveyance thereof to itself of said property, a declaration of trust, simultaneously executed by such trustee reciting the beneficial interest of others in said property, is not subject to the deed filing tax (General Acts, 1935, pp. 256, 456, Section 46).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion, bearing date of January 28, 1941, is as follows:

"Please advise if this office should collect a deed tax on an instrument filed for record under the following circumstances:—

"A mortgage or deed of trust executed to the Birmingham Trust and Savings Company as trustee, was foreclosed and at the foreclosure sale, the Birmingham Trust and Savings Company in its corporate capacity bid in the property and filed the foreclosure deed for record and paid a deed tax equal to the amount of the consideration.

"Simultaneously the Birmingham Trust and Savings Company in its individual capacity executed a declaration of trust setting forth that it

bid the property in for the various beneficial owners of the indebtedness secured by said mortgage or deed of trust.

"Subsequently, the declaration of trust is presented for recording. Should the Probate Judge collect a deed tax on recording the declaration of trust?

"The Birmingham Trust and Savings Company contends that in as much as the mortgage or deed of trust was made payable to the Birmingham Trust and Savings Company as trustee, and that for matters of convenience that at the foreclosure sale the property was bid in by the Birmingham Trust and Savings Company in its individual capacity and a deed tax paid at that time, that the mere execution of a declaration of trust simultaneously is not an instrument on which there is due an additional deed tax. When the Birmingham Trust and Savings Company subsequently conveys the property as trustee under the declaration of trust, a deed tax admittedly will be due.

"The declaration of trust signed by the Bank authorized the Bank to continue to handle the property and execute conveyances of the property."

The privilege or license tax upon the record of deeds, bills of sale and other instruments of like character under Schedule 46 of Section 348 of the Revenue Act of 1935 (General Acts, 1935, pp. 256, 456), falls only on such instruments as **convey** property or an interest therein.

You have submitted a copy of the declaration of trust referred to, from which it appears that no interest legal or equitable was thereby conveyed. It does clearly appear that said instrument was executed in order to show beyond controversy the various equitable titles or interests in the trust estate and to define the powers and limit the liability of the trustee with reference thereto. It did not operate to create or to pass any title or interest not previously existing.

See also the opinion of this office, rendered March 31, 1937, to Hon. William W. Hill, Judge of Probate, Montgomery County (Quarterly Report of Attorney General, Vol. VI, page 177), holding that an instrument confirming the appointment of a new trustee to succeed a resigning trustee is not subject to the deed filing tax, in that such an instrument merely confirms a legal title which is already in existence.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Attorneys—Licenses—Board of Commissioners of the State Bar Association—Judges of Probate—

1. Judges of Probate entitled to 2½% commission on entire $25 license fee for attorneys provided for in Act No. 551, S. 329, approved September 19, 1939 (General Acts, 1939, page 871).

2. Said 2½% commission is deductible from the $10 which goes to the general fund of the state and the Bar Commissioners Fund receives the $15 earmarked therefor in toto.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 20, 1940, in which you request my official opinion as follows:

"Please refer to Act 551, Page 871, General Acts of 1939 approved September 19, 1939, and advise me in answer to the following:

"1. Is the Probate Judge entitled to receive 2½% commission on the entire $25.00 provided in Section No. 11 of the 1939 Act?

"2. Should the Alabama State Bar Association receive the entire $15.00 of the $25.00 License Fee provided in Section No. 11, or in the event you hold the Probate Judges are entitled to 2½% commission on the entire $25.00, should the commission be deducted from the Bar Association's $15.00 and from the State's $10.00?

"Under date of December 2, 1935 the Attorney General rendered an opinion to Hon. Chas. W. Lee, State Comptroller holding that the commission due a Probate Judge should be based on the entire $25.00 collected but the Alabama State Bar Association to receive its $10.00 share intact, the State's part to bear the whole of the commission deducted.

"Recently this subject has again been the cause of debate and speculation and the writer seeing no material change in the wording of the 1939 Amendments to the 1935 Revenue Code in so far as the manner and method of the Probate Judge getting his commission, we now need your official ruling on the subject."

Before answering your specific inquiries, I desire to trace the legislative history concerning the levying and collecting of license fees required of attorneys and the proper disposition thereof. This will be done for the purpose of ascertaining the true legislative intent.

Sections 10, 11 and 12 of Act No. 133, H. 412, approved August 9, 1923 (General Acts, 1923, page 100), entitled "An Act to provide for the organization, regulation and government of the State Bar including admissions and disbarments of lawyers," provide as follows:

"Section 10. All applicants for admission to the Bar shall pay to the Board of Commissioners a fee of ten dollars, which shall be paid to the State Treasury and shall become a part of the separate fund in Section 11 hereof provided for.

"Section 11. License Fee. Every member of the State Bar shall, prior to the first day of October in each year in the same manner as required by law for the payment of license fee, pay into the State Treasury as a license fee the sum of ten dollars, five dollars of which shall remain in the State Treasury as part of the general fund and five dollars of which together with the fees paid by applicants for admission, shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners. The State Treasurer is authorized to provide such rules as may be necessary for the payment and collection of such fees through the Probate Judge, Auditor or other officials. As soon after the first day in October in each year as practicable the State Treasurer shall certify to the Secretary of the Board of Commissioners the names of attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the voting or transaction of business by the State Bar as being in good standing. Provided however that no lawyer shall be required to pay a license until after he has practiced his profession for two years.

"Section 12. The fees and license above provided for shall be in lieu of all other state and county license and revenue fees and charges."

Said Sections 10, 11 and 12, supra, appear as Sections 6229, 6230 and 6231 of the Code of Alabama, 1923, respectively.

In the Revenue Act of 1927 (General Acts, 1927, page 139) there is levied a license on attorneys by Section 7 thereof, which provides as follows:

"Section 7. ATTORNEYS.—Each Attorney engaged in the practice of law shall pay an annual license of Fifteen Dollars ($15.00) to the State, but no license shall be paid to the county. If such business is conducted as a firm, or as a corporation in which more than one lawyer is engaged, each lawyer so engaged shall pay a license; provided, that the license imposed by this section shall not apply until such attorney shall have practiced his or her profession as long as two (2) years. The license tax herein imposed is in addition to the license fee required under Section 11 of an Act approved August 9, 1923, (General Acts, 1923, page 105), to provide for organization, regulation and government of State Bar, etc."

It will here be noted that immediately after the Revenue Act of 1927 became effective, the total amount of license fee chargeable to attorneys was $25, viz; $10 under the 1923 Act, supra, and $15 under the 1927 Act, supra.—Biennial Report of Attorney General, 1928-1930, page 86.

Act No. 241, S. 85, approved June 6, 1931 (General Acts, 1931, page 284), amended, among other sections of the 1923 Act, supra, Sections 10 and 11 thereof. Said Sections 10 and 11, as amended, read as follows:

"Section 10. All applicants for admission to the Bar shall pay a fee of ten dollars to the State Treasurer, which shall become a part of the separate fund in Section 11 hereof provided for, and file the Treasurer's receipt therefor with their applications.

"Section 11. LICENSE FEE. Every member of the State Bar shall, prior to the first day of October in each year in the same manner as required by law for the payment of license fees, pay into the State Treasury as a license fee the sum of Ten Dollars ($10.00), Five Dollars ($5.00) of which shall remain in the State Treasury as part of the General Fund and Five Dollars ($5.00) of which, together with the fees paid by applicants for admission, shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners. The said fund shall be paid out by the Treasurer as heretofore, or if directed by said Board, on receipt of a voucher therefor and a copy of the order of the Board of Commissioners, directing the payment of such fund to the signer of said receipt. As soon after the first day in November in each year as practicable, the State Treasurer shall certify to the Secretary of the Board of Commissioners the names of attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the courts of Alabama or in the voting or transaction of business by the State Bar as being in good standing until they have paid the required license fee. Provided that no lawyer shall be required to pay a license fee until the first day of October following the expiration of two years from his admission to the Bar."

The 1931 amendment to Section 11 of the 1923 Act, supra, did not change the amount of the license fee or the distribution thereof. However, it did eliminate the provision of the provision of the 1923 Act, supra, authorizing the State Treasurer to provide such rules as may be necessary for the payment or collection of such fees through the Judge of Probate, Auditor or other officials. Under the 1931 amendment, supra, the $10 license fee, therein provided, was payable in all events directly to the State Treasurer. By its specific terms, $5 remained in the State Treasury as part of the general fund and the other $5 (together with other funds) constituted a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners.

In an opinion of this office rendered to the State Tax Commission on September 25, 1933 (Biennial Report of Attorney General, 1932-34, page 342), it was held that the 1931 amendment, supra, to the 1923 Act, supra, did not

effectuate a repeal of the 1927 Act, supra. It therefore follows that the total amount of license fees required of attorneys immediately after the 1931 Act, supra, was $25, the same as before the 1931 amendment, supra.

The Legislature of 1935, in enacting its Revenue Act, provided a license for attorneys. Schedule 10 of Section 348 of the Revenue Act of 1935 provides as follows:

> "Schedule 10. Each attorney engaged in the practice of law shall pay an annual license of Twenty-Five Dollars ($25.00) to the State, but no license shall be paid to the County. If such business is conducted as a firm, or as a corporation in which more than one lawyer is engaged, each lawyer so engaged shall pay a license; provided, that the license imposed by this Schedule shall not apply until such attorney shall have practiced his or her profession as long as two (2) years. Ten Dollars ($10.00) of the license herein levied together with the fees paid by applicants as otherwise provided by law, shall remain in the State Treasury and shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners of the Alabama State Bar Association. As soon after the first day of October in each year as practicable the State Treasurer shall certify to the Secretary of the Board of Commissioners of the Alabama State Bar Association the names of attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the voting or transaction of business by the State Bar as being in good standing. Provided, however, that no lawyer shall be required to pay a license until after he has practiced his profession for two years."

In enacting Schedule 10, supra, it appears that the Legislature intended to consolidate the licenses levied by the 1923 Act, as amended in 1931, supra, and the 1927 Act, supra, in providing a total license of $25, $10 of which remained in the State Treasury and constituted a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners of the Alabama State Bar Association.

In 1939, the Legislature amended Sections 10 and 11 of the 1923 Act, as amended by the 1931 Act, supra, by Act No. 551, S. 329, approved September 19, 1939 (General Acts, 1939, page 871). Said act provides as follows:

> "Section 1. That Section 10 and 11 of an Act entitled an 'Act to provide for the organization, regulation and government of the State Bar, including admissions and disbarments of lawyers' approved August 9th, 1923, as said Section 10 and 11 of said Act were heretofore amended by an Act approved June 6th, 1931, be and they are severally hereby amended to read as follows: Section 10. All applicants for admission to the Bar shall pay a fee of Ten and no/100 ($10.00) Dollars to the State Treasurer, and applicants who are required to be examined by the Board of Examiners of the State Bar shall pay an additional fee of Fifteen and no/100 ($15.00) Dollars all of which fees shall become a part of the separate fund in the succeeding section provided for, and file the Treasurer's receipt therefor with their application. Section 11. License Fee. Every Member of the State Bar shall, prior to the first day of October

in each year in the same manner as required by law for the payment of license fees, pay as a license fee the sum of Twenty-Five ($25.00) Dollars, but no license shall be paid to the County. Ten ($10.00) Dollars of the license herein levied shall remain in the State Treasury as a part of the General Fund and Fifteen ($15.00) Dollars thereof, together with the fees paid by applicants for admission as provided for in the preceding section, shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners of the State Bar. The said fund shall be paid out by the Treasurer as heretofore, or if directed by said Board, on receipt of a voucher therefor and a copy of the order of the Board of Commissioners, directing the payment of such fund to the signer of said receipt. As soon after the first day in November in each year as practicable, the State Treasurer shall certify to the secretary of the Board of Commissioners the names of attorneys who have paid such license fee, and the Judge of Probate of each county shall certify to the Judges of the Circuit Court having jurisdiction in such County the names of the attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the Courts of Alabama or in the voting or transaction of business by the State Bar as being in good standing until they have paid the required license fee. Provided that no lawyer shall be required to pay a license until the first day of October following the expiration of two years from his admission to the Bar."

In an opinion of this office rendered to the Judge of Probate of Mobile County on November 22, 1939 (Quarterly Report of Attorney General, Volume XVII, page 295), it was held that Section 11, as amended by the 1939 Act, supra, was a pro tanto amendment of Schedule 10 of Section 348 of the Revenue Act of 1935, supra, and that the provisions of the Revenue Act of 1935 relative to the due date of licenses in general was applicable to the 1939 Act, supra. Reasoning by analogy, it follows that Section 365 of the Revenue Act of 1935, providing for a 2½% commission allowable to Judges of Probate for collecting and remitting licenses is likewise applicable to the license levied by Section 11, as amended by the 1939 Act, supra. It, therefore, follows that your first inquiry should be answered in the affirmative.

The question now presents itself as to whether or not under Section 11, as amended by the 1939 Act, supra, the said 2½% commission is deductible from the $15 which is credited to the Bar Association Fund, the $10 which is credited to the Bar Association Fund, the $10 which is credited to the general fund, or from the total $25 collected and each separate fund to bear its proportionate part of the 2½% commission.

In an opinion of this office rendered to the State Comptroller on September 2, 1935 (Quarterly Report of Attorney General, Volume I, page 272—Biennial Report of Attorney General, 1934-1936, page 409), it was held that under the provision of Schedule 10 of Section 348 of the Revenue Act of 1935, supra, the Judge of Probate was entitled to collect 2½% commission on the total $25, which 2½% commission was deductible from the $15 which went to the general fund and that the $10 earmarked for the Bar Association Fund remained intact. Said opinion, holding that the $10 earmarked for the Bar Association Fund remained intact, proceeded on the theory that

under the verbiage of Schedule 10, supra, the said $10 was specifically earmarked for the Bar Association Fund and no part of the Probate Judge's commission should be deducted therefrom.

Under the 1939 Act, supra, it will be noted that out of the $25 collected, $15 is specifically earmarked for the Bar Association Fund and $10 is specifically earmarked for the general fund. The verbiage of the 1939 Act, supra, was taken from the verbiage of the 1923 Act, supra, as amended by the 1931 Act, supra. As above pointed out, in the 1931 amendment the attorney's license fee provided therein was paid directly to the State Treasury. The adoption of the language of the 1931 amendment was evidently the cause of specifically earmarking the said $15 and $10 in the 1939 Act, supra.

However, in my judgment, it was the legislative intent by the adoption of the 1939 Act, supra, to change the proration of the $25 provided for in the 1935 Act, supra, (after deduction of the commission of the Judge of Probate), i. e., by allowing the State Bar Fund $15 rather than $10. That portion of the 1939 Act, supra, specifically earmarking the $10 for the general fund may well be regarded as surplusage, as all license fees collected, unless otherwise specifically earmarked, go into the general fund of the State. The above interpretation, in my judgment, shows the true legislative intent and exemplifies the spirit of the statute rather than the strict letter thereof. The letter of a statute should not control the spirit, and a literal interpretation which would defeat the statute's purpose should not be adopted when any other reasonable construction can be given to the words. **Jefferson County v. Hawkins,** 232 Ala. 398, 168 So. 443. In construing a statute, one must look to the context, the spirit and the whole of the statute, as well as other statutes, to reach the true intent of the Legislature. A thing within the intention of the enactment of a statute is as much within the statute as if it were within the letter thereof, and a thing within a letter is not within the statute, unless within the intention. **City of Birmingham v. Southern Express Company,** 164 Ala. 529, 51 So. 159, Cf. Scott v. Lee, 236 Ala. 420, 183 So. 344.

In view of the above, it follows that the 2½% commission allowed the Judge of Probate for collecting the attorneys' licenses of $25 should be deducted from the amount of $10 which remains to the credit of the general fund and that the Bar Association is entitled to be credited with the $15 of the $25 collected. This answers your second inquiry.

The above interpretation, as above stated, in my judgment evinces the true legislative intent. This statement is strengthened by the fact that a section of the manuscript of the 1940 Code pertaining to attorneys' license fees specifically provides that $15 of the $25 collected shall go to the credit of the Bar Association Fund without any reference to the disposition of the remaining $10, which under the general law goes to the general fund of the State. There can be no doubt that the whole of the $15 or the $25 license

levied under the provisions of the 1940 Code is earmarked to the benefit and use of the Commissioners of the Alabama State Bar. See opinion to State Comptroller on December 2, 1935, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 27, 1941.

Hon. William J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Fine and Forfeitures—

Fine imposed upon defendant charged with manslaughter in second degree held payable to county, although arresting officer is highway patrolman.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 8, 1941, in which you request my official opinion as follows:

"Kindly let me have your early opinion as to the following matter which presently confronts me:

"An Alabama Highway Patrol officer arrested a person charged with Manslaughter growing out of an automobile of the defendant-driver colliding with the deceased person. The defendant is convicted in this the Inferior Criminal Court. I as Clerk of this Court collect the fine and costs. To which department should I transmit the fine; The Alabama Highway Patrol, by check made payable to the Treasurer of the State of Alabama; or to the County of Mobile, by check made payable to the County Treasurer?"

I assume that the Inferior Criminal Court of Mobile has jurisdiction of the offense. In my opinion you should remit the fine in the case named in your request to the County Treasury of Mobile County. Biennial Report of Attorney General, 1936-38, page 34.

Manslaughter in the second degree is not what is generally deemed a violation of the highway laws, therefore, consideration of the highway laws

of Alabama is not here necessary. I wish to further refer you to Section 4038 of the Code of 1923, which provides as follows:

"Section 4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

This section provides for the disposition of fines and forfeitures and has been held mandatory. See **Ryan v. Collins,** 196 Ala. 478, 71 So. 690. See also **Jackson County v. Derrick,** 117 Ala. 348, 23 So. 193, in which it was held that title sufficient to support a suit for the recovery of fines and forfeitures, rested in the county. You will note that under the provisions of the above quoted Section 4038, Code of 1923, all fines go to the county in which the prosecution was commenced unless otherwise specifically provided. This is the general law and must control the answer to your question unless some specific provision of the law provides to the contrary; I find no such provision. The fact that the arresting officer was a highway patrolman, in my judgment, cannot affect the disposition of the fine in the present case.

Premises considered, it is my opinion that the fine in the case named by you should be remitted to the County Treasurer of Mobile County to be deposited to the credit of Mobile County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 1, 1941.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Counties — Public Buildings —

Authority of Court of County Commissioners to appropriate funds from General Fund, County's portion of the sales tax, and County's portion of receipts from Alabama Beverage Control Act, for purpose of paying County's part of the costs of recreation center and office building, discussed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of February 7, 1941, is as follows:

"The City of Union Springs, Alabama, and Bullock County are anxious to enter into a joint undertaking in the construction of a building in the City of Union Springs to be used as a recreation center by the people of Union Springs and Bullock County, as well as office space for the County Farm Agent and/or County Welfare Department.

"The office facilities in the Courthouse of Bullock County are inadequate to house all of the agencies entitled to be located therein and, therefore, it is the desire of the Commissioners' Court to enter into this joint undertaking with the City of Union Springs.

"I request your opinion on the following questions:

"1. Can the Court of County Commissioners of Bullock County legally appropriate funds out of the general fund for the purpose of paying its part of the costs of such building?

"2. Can the Court of County Commissioners of Bullock County legally appropriate funds out of the sales tax fund for the purpose of paying its part of the costs of such a building?

"3. Can the Court of County Commissioners of Bullock County legally appropriate funds out of the Liquor tax fund for the purpose of paying its part of the costs of such a building?"

Answering your first inquiry, it is my opinion that the Court of County Commissioners of Bullock County may legally appropriate funds from the general fund for the purposes of paying its part of the costs of the building in the City of Union Springs. In an opinion rendered to Hon. J. C. Kellett, Judge of Probate, DeKalb County, Fort Payne, Alabama, under date of March 9, 1939 (Quarterly Report of Attorney General, Vol. XIV, page 178), I held that Courts of County Commissioners are authorized to issue interest-bearing warrants for the construction of certain public buildings, among them being a County Activity Building. The conclusion therein reached was based upon the following:

"It was said in **State ex rel Day v. Bowles, et al,** 217 Ala. 458, that the county is a unit of the government invested with legislative, judicial and executive or administrative powers conferred by legislation, including the power to erect public buildings. Among the powers conferred and duties imposed by legislation is that of erecting, furnishing and equipping necessary public buildings. It was said in the case of **Board of Revenue of Covington County v. Merrill,** 193 Ala. 521, that the duty to erect and maintain public buildings for the county is mandatory on courts of county commissioners and boards of revenue.

"In the location, erection, repair, removal or the furnishing of the county's public buildings, the commissioners' court or board of revenue exercises discretion that cannot be exercised for them. In the performance of such duties they exercise a function that is quasi legislative, and their actions in this behalf when free from fraud, corruption or any unfair dealings cannot be controlled or reversed by any other court. As authority for this statement, I refer you to **Matkin v. Marengo County,** 137 Ala. 155, 34 So. 171; **Hayes v. Ahlrichs,** 115 Ala. 239, 22 So. 456; **Parnell v. Commissioners Court,** 34 Ala. 278; **Commissioners Court v. Bowie,** 34 Ala. 461; **Moore v. Hancock,** 11 Ala. 245; **White v. Hewlett,** 143 Ala. 347, 42 So. 78.

"Futhermore, Section 212 of the Code gives the authority to erect public buildings for the county to the county commissioners and boards of revenue. The final authority as to the necessity of building the public buildings rests with the court of commissioners."

Cf. Biennial Report of Attorney General, 1936-38, pages 227, 228.

In view of the foregoing authorities, it is my opinion that the Court of County Commissioners of Bullock County may appropriate funds from its general fund for the purpose of paying its part of the costs of the described building.

Your second inquiry is answered by an opinion of this office rendered to Hon. J. M. Copeland, Judge of Probate, Blount County, Oneonta, Alabama, under date of June 30, 1939 (Quarterly Report of Attorney General, Vol. XV, page 343). It was there held that if the proposed project is approved by the appropriate State agency, i. e., the State Department of Public Welfare, the Agricultural Extension Service or the State Board of Health, the Court of County Commissioners may appropriate money received from the sales tax for the erection of such a project. Cf. Quarterly Report of Attorney General, Vol. XVII, page 259.

With regard to the right of the Court of County Commissioners to appropriate monies to aid in the construction of the building in question from the proceeds of the Alabama Beverage Control Act, Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 (General Acts, 1936-37, page 40), your attention is directed to Act No. 401, H. 886, approved September 15, 1939 (General Acts, 1939, page 526), the pertinent part of which is as follows:

"Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Department of Public Welfare."

You will note from this section that ten per cent of the funds derived from the net profit of the State Liquor Stores under the provisions of the Act are paid into the Treasury of the State to the credit of the General Fund of the sixty-seven counties. These funds may, of course, be expended by the county for any lawful purpose, after the preferred claims set forth in Section 231 of the Code of Alabama, 1923, as amended, and all other involuntary obligations against said fund have first been paid, provided there exists a surplus in the General Fund sufficient to permit the desired appropriation.

If, therefore, a surplus exists in the General Fund after the payment of all involuntary obligations, the county governing body may legally make the appropriation from said fund for the purpose concerning which you inquire. Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, dated August 27, 1937 (Quarterly Report of Attorney General, Vol. VIII, page 202).

You will also note that an additional ten per cent is paid into the Treasury of the State to the credit of the sixty-seven counties to be used by the counties for the purposes of public health, old age pensions and for "the other purposes of the County Departments of Public Welfare."

It is my opinion that the Court of County Commissioners may **not** use this portion of the proceeds from the Alabama Beverage Control Act for the purpose concerning which you inquire, unless the construction of such a building is for the purpose of public health, old age pensions or for the other purposes of the County Departments of Public Welfare.

In this connection, you are advised that the State Department of Public Welfare, by resolution of the State Board of Public Welfare of March 3, 1938, has ruled that only such matters as fall within the public assistance category, to wit, Old Age Assistance, Aid to the Blind, Aid to Dependent Children, Temporary Aid, and Aid to the Mentally and Physically Handicapped, are to be included within the term "public welfare." Cf. Quarterly Report of Attorney General, Vol. XIX, page 126.

If the proposed building will actually be occupied by the County Department of Public Welfare or any of its agents, then, under the opinion cited above, the Court of County Commissioners may appropriate a reasonable sum from this earmarked portion of the Alabama Beverage Control Act proceeds toward the construction of such building. What would constitute a "reasonable" sum would, of course, depend upon the space to be occupied by the welfare agencies, the length of time of occupancy contemplated and the reasonable value of such space.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 1, 1941.

Hon. Rascoe Maddox,
Superintendent,
Chilton County Board of Education,
Clanton, Alabama.

Schools — County Board of Education — Property —

1. Title to real property deeded to school trustees for school purposes vests in County Board of Education under Section 95 of School Code of 1927.

2. Said property, together with school equipment, may be transmitted or conveyed by said Board under Section 132 of the School Code of 1927.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of November 14, 1940, in which you request my opinion as follows:

"There are a number of school buildings and sites in this county deeded to the local trustees and their successors. Some of these schools are closing due to consolidation or decrease in attendance.

"I should like to ask

"1) who has legal authority to dispose of the building and site?

"2) who has authority to dispose of the equipment in said building, the equipment having been bought thru the County Board of Education with funds raised locally and supplemented by county funds."

In answer to your inquiries 1 and 2, you are advised that in my opinion the county board of education is the proper board to dispose of the real and personal property mentioned in your request.

School trustees are boards authorized to be created by the State under the provisions of Section 133 of the School Code of 1927, and are therefore State boards.

It is well settled law that where a state board is empowered to take and hold the title to property for State purposes, it is State property.—**Milwaukee vs. McGregor,** 121 N. W. 642, 140 Wis. 35, 17 Ann. Cas. 1002.

In 59 C. J. page 1064, Section 276, we find the following statement:

" *** The power of the State in respect of its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose."

Your attention is called to Section 95 of the School Code of 1927, which reads as follows:

"95. Property Vested in County Board.—All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any County for the benefit of the public schools of any County, hereby transferred and vested in the County Board of Education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular County, school district, or public school, shall be held in trust by the County Board of Education for the benefit of any such county school district or school."

It will be noted from the above quoted section of the School Code that all property, effects, money, funds, claims and donations now or hereafter vested by law in the public school authorities of any county, for the benefit of the public schools of such county, are transferred to and vested in the County Board of Education.

The effect of the above section, in my opinion, is to divest the title of property out of the local trustees, and invest the title to such property in the County Board of Education, which the legislature has full authority to do under and by virtue of the authority hereinabove cited and referred to.

Section 132 of the School Code of 1927 reads as follows:

"132. **Powers of County Board.**—The County Board of Education shall have the right to acquire, purchase, or by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the Board and spread upon its minutes. All processes shall be executed by service on the executive officer of the Board."

It will be noted from the above quoted Section that the County Board of Education is specifically authorized and empowered to "transmit and convey the title to real and personal property for school purposes."

In connection with your second inquiry, it is my opinion that it is immaterial that the equipment therein mentioned was bought with funds raised locally and supplemented by the County Board, as it will be noted from the above quoted Sections of the School Code that all the real and personal property in question is transferred to and vested in the County Board of Education, with authority to "transmit and convey the title to real and personal property for school purposes."

You are, therefore, advised that in my opinion the County Board of Education, and not the local school trustees, is the proper authority to convey the real and personal property mentioned in your request.

Cf: Biennial Report of Attorney General, 1926-28, pages 609, 748;

Biennial Report of Attorney General, 1928-30, page 121;

Biennial Report of Attorney General, 1934-36, page 90;

Quarterly Report of Attorney General, Vol. XVII, page 136.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 1, 1941.

Hon. J. Beamon Hawk,
Circuit Court Clerk,
Marshall County,
Guntersville, Alabama.

Clerks — Acts 1931, page 668 — Michie's Code Section 6724(1) —

1. Duty of Clerk of Circuit Court to resubpoena witnesses in criminal case where case is continued is mandatory.

2. Duty extends to Clerk of the Circuit Court when acting as ex-officio Clerk of the County Court.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of February 11, 1941, is as follows:

"Section 3803 of the Code makes Clerks of the Circuit Court ex officio Clerks of the County Courts of their respective Counties.

"Section 3804 provides that such Clerks' fees and compensation as their duties as Clerk of the County Court shall be the same as now allowed by law to the Clerks of the Circuit Court in criminal cases, and shall be paid in like manner.

"By an Act of the Legislature in 1931, page 668, where a case has been continued in the Circuit Court, the law makes it the duty of the Clerk of the Circuit Court to issue a subpoena for all witnesses in such cause when it is next set, and makes it the duty of the Sheriff to execute such subpoena, and provides that the Clerk for such services required of him by this Act and the Sheriff for such additional services required of him, shall each receive the same compensation that he received for issuing or serving the original summons as the case might be.

"This Section provides that such costs accruing from such service shall be taxed and paid as other costs are taxed and paid in criminal cases.

"(1) Where a Judge of the County Court makes an order of continuance in a case in County Court, is it my duty to issue a subpoena for all the witnesses in such case when it is next set, and deliver them to the Sheriff for execution, and will it become his duty to serve such summons in County Court, and will such Clerk and Sheriff receive the same compensation in County Court if they perform such service that would be paid them for such service in the Circuit Court?

"(2) Where the Judge makes an order in County Court that the case is continued, and the witnesses will not be resummoned, but are required to come on the former summons, does the Act of the Legislature of 1931, page 668, make it the duty of the Clerk to reissue the summons and the Sheriff to serve the new summons for such term to which it is continued in the face of such order, and if it is done can the Clerk and Sheriff receive pay for their said services at the same amount as if the papers were issued and served from the Circuit Court?"

Your first inquiry should be answered in the affirmative. The question of the Clerk's fee was decided by an opinion of this office addressed to Hon. Howard Kirby, Clerk, Circuit Court, Etowah County, rendered under date of September 18, 1935 (Biennial Report of Attorney General 1934-36, page 299), wherein it was held that where the Clerk of the Circuit Court was acting in the capacity of ex-Officio Clerk of the County Court he was entitled to his fee for reissuing subpoenas under authority of Act No. 575, S. 276, approved July 28, 1931 (General Acts, 1931, page 668). Under authority of this opinion and Section 3804 of the Code of Alabama, 1923, the Clerk's fee for performing this duty in the County Court would be the same as allowed him in the Circuit Court. The Sheriff is entitled to his regular fee for serving subpoenas as provided for by Section 3741 of the Code of Alabama, 1923.

In answer to your second inquiry, it is my opinion that Act No. 575, supra, places a mandatory duty upon the Clerk to resubpoena all witnesses when a case is continued. Section 6724 of the Code of Alabama, 1923, sets out the duties of the Clerk of the Circuit Court. Sub-section 20 of Section 6724 provides as follows:

"To perform such other duties as are, or may be, required of them by law."

In 1931 the Legislature saw fit to impose an additional duty upon the Clerk of the Circuit Court, and Act No. 575, supra, was passed. Act No. 575 provides as follows:

"Section 1. Where a case has been continued, it shall be the duty of the clerk of the Circuit Court to issue a subpoena for all witnesses in such cause, when it is next set, and it shall be the duty of the Sheriff to execute such subpoena by summoning the witnesses named therein.

"Section 2. The Circuit Clerk shall, for the services required of him by this Act, receive the same compensation that he receives for issuing the original subpoenas, and the Sheriff shall receive the same compensation that he receives for serving the original summons.

"Section 3. The costs accruing from the services performed as provided in this Act, shall be taxed and paid as other costs are taxed and paid in criminal cases."

It will be noted that this Act makes it the duty of the Clerk to reissue witness subpoenas when the case has been continued. It does not merely authorize the Clerk to do so if requested, nor does it authorize the Circuit Judge to determine whether or not said subpoenas should be issued. It is a mandatory duty placed upon the Clerk by the Legislature, and when the Clerk performs his duty in accordance with law, he is entitled to his fee although the Circuit Judge may have ordered that the witnesses be not re-subpoenaed. The use of the imperative "shall" shows the intent in this connection. **Coleman v. Town of Eutaw,** 157 Ala. 327, 340, 47 So. 703. The same would apply to the Sheriff in serving the subpoenas. Cf. Opinion to Hon. William F. Feagin, Director, Board of Administration, rendered by this office under date of October 1, 1931 (Biennial Report of Attorney General, 1930-32, page 474).

In view of the opinion of this office to Hon. Howard Kirby, supra (which opinion is based on the case of **Swindle v. Crocker,** 115 So. 252, 217 Ala. 199), the same would apply in cases where the Clerk of the Circuit Court was acting as ex-Officio Clerk of the County Court under the general laws of this State.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 1, 1941.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Deed Filing Tax — Executor's Deed — Trustees —

Where a testator devised and bequeathed his residuary estate in trust to certain trustees, the deed of his executor conveying said estate to said trustees, pursuant to a decree rendered in the course of administration of the estate and upon final settlement thereof, was not subject to the filing tax imposed by Schedule 46 of Section 348 of the Revenue Act of 1935 (General Acts, 1935, p. 456).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of December 20, 1940, reads as follows:

"There has been presented to me as Probate Judge of Morgan County, Alabama, for filing and recordation, a certain instrument or deed from Mrs. Annie Lou Spight Burr, as Executrix of the last Will and Testament of W. R. Spight, deceased, to Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees of the 'W. R. Spight Religious and Charitable Trust,' their successors and assigns.

"This deed is a conveyance by Mrs. Burr, as Executrix of the W. R. Spight Estate to Mrs. Burr, D. F. Green and J. H. Johnson, as Trustees of the 'W. R. Spight Religious and Charitable Trust,' of the residuary properties, real and personal, of the Estate of W. R. Spight, deceased.

"It is the contention of Mrs. Burr as Executrix, and as Trustee, that this instrument is not subject to privilege or license tax provided by Section 21½ of the General Revenue Act of the State of Alabama of 1927. See General Acts of Alabama, Regular Session, 1927, page 163.

"I wish to respectfully call on you for your opinion as to whether or not the instrument is subject to this tax.

"The facts are as follows:

"W. R. Spight, a resident of the City of Decatur, Alabama, made a last Will and Testament on the 18th day of August, 1936. Mr. Spight died on September 2, 1936, and a petition was filed in the Probate Court of Morgan County, Alabama, for the probation and recordation of his Will.

"The Will of W. R. Spight was admitted to probate and record by decree of the Probate Court of Morgan County, Alabama on September 9, 1936. By his Will, Mr. Spight, in brief, made the following disposition of his Estate:

"Item I. provided for the payment of all debts.

"Item II. gave to his sister, Annie Lou Spight Burr, $25,000 and household furniture.

"Item III. devised to Annie Lou Spight Burr for the period of her life, his residence in the City of Decatur, and at her death:

"'And at the death of my sister, Annie Lou Spight Burr, I do hereby give, will, devise and bequeath said residence to D. F. Green and J. H. Johnson and E. H. Barnett, as Trustees of the 'W. R. Spight Religious and Charitable Trust,' to become a part of my residuary Estate' (Mrs. Burr, Mr. Green and Mr. Johnson were the original Trustees, but on Mrs. Burr's death, Mr. Spight named R. H. Barnett as her successor).

"Item IV. gave $10,000 to the Trustees of the Benevolent Society Hospital of Decatur, Alabama.

"Item V. $20,000 to the Trustees of the Central Baptist Church of Decatur, Alabama.

"Item VI. provides in part as follows:

"'All of the balance and residue of all the real, personal and mixed properties, choses in action, wheresoever situated and located, and of which I may die seized and possessed, I wish and desire to give, will, bequeath and devise in the manner and way hereinafter set out, that is to say, through the Trustees of the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," to the Religious, Charitable, Education and Eleemosynary Institutions hereinafter named in this Item VI. and in the proportions and percentages hereinafter stated, in Trust, however, and for the specific uses, benefits, purposes and objects hereinafter set forth.

"'For the control, management, operation, final liquidation and disposition of said Residuary Estate, and until the time such gifts, bequests, devises shall be ultimately vested in the beneficiaries thereof named in this Will, and for the due accomplishments of the objects and purposes of these gifts, bequests and devises to the Beneficiaries, namely, Religious, Charitable, Educational and Eleemosynary Institutions, I do hereby create and establish a Trust to be known and designated as the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," and do nominate, designate and appoint my beloved and devoted sister, Annie Lou Spight Burr, and D. F. Green and J. H. Johnson, as Trustees of "THE W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST."

"'In the event said above named Trustees or any one of them fail or decline to act in said capacities, or after accepting, resigns, then I do hereby nominate, designate and appoint the following to act in their place or stead, in the order of their naming, namely: E. H. Barnett and David D. Gibson and Charles H. Eyster, and the same rights, titles, powers and authorities are hereby vested in the said substitutes or successors as in the originally named and designated and appointed Trustees, except the specific salary provision for Annie Lou Spight Burr.

"'For the Trust uses, purposes, benefits and objects, and under the powers, authorities and duties of the "TRUSTEES OF THE W. R. SPIGHT REILIGIOUS AND CHARITABLE TRUST," as in this ITEM hereinabove set forth, and for the Trust purposes, objects, uses and benefits, and under the powers, duties and authorities of the "TRUSTEES OF THE W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," hereinafter in this Item set out and defined, I do hereby give, will, bequeath and devise to Annie Lou Spight Burr and D. F. Green and J. H. Johnson (their substitutes and successors) as "TRUSTEES OF THE W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," in Trust, however, for the following named Religious, Educational, Charitable and Eleemosynary Institutions, in the proportions and percentages, in Trust, however, for the following uses and purposes:'

"(1) Trustees of the Southern Baptist Foreign Mission Board of Richmond, Virginia, 50%.

"(2) Trustees of the Baptist Mission Board at Montgomery 2%.

"(3) Trustees of the Baptist Home Mission Board, Atlanta, Georgia, 3%.

"(4) Trustees of the Southern Baptist Theological Seminary, 5%.

"(5) Trustees of the Baptist Bible Institute, 10%.

"(6) Trustees of Howard College, 10%.

"(7) Trustees of Judson College, 2%.

"(8) Trustees of Union University, 8%.

"'All of the balance and residue of all of the personal, real and mixed properties, choses in action, remainder and reversionary estate and interest, wheresoever situated and located, not hereinbefore disposed of by me in this Will, and of which I may die seized and possessed.

"'Should any one or more of the Institutions named in this Item be, for any reason, incapable of receiving the gifts herein made to it, then that part so given to such Institution, is hereby given and willed to the other Religious, Educational and Eleemosynary Institutions named in this Item on the basis of the proportions and percentages herein fixed.

"'The full and complete right, power and authority is hereby invested in said Trustees to grant, bargain, sell and convey, and for the reasonable and fair market value thereof, as determined by said Trustees, all real estate herein give, willed, and devised to said Trus-

tees; and to sell, transfer and assign and deliver, at and for the reasonable and fair market value thereof, as determined by the Trustees, all stocks, bonds, securities and investments, choses in action, properties and claims of every kind and character, hereunder given, willed and bequeathed to said Trustees.

"' *** Should, in the opinion and judgment of my Trustees, the immediate division and distribution of the Estate given them in this Item for distribution to the Beneficiaries named in this Item, be unprofitable, inconvenient, or cause the sacrifice to said Trust, then said legacies and gifts shall be paid by the said Trustees gradually from time to time until the same have been fully paid by exhaustion of the Trust, but full and complete liquidation of said "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," is to be had within twelve months after the death of my sister, Annie Lou Spight Burr.

"'My said Trustees are hereby given full power and authority to execute their best judgment and discretion within the time fixed for final settlement of the Trust, namely, twelve months after the date of the death of Annie Lou Spight Burr, of making disposition of and selling the properties and holdings given to them in Trust, under this Item of my Will, and for the purposes of paying the legacies and gifts made under this Item, but I direct that as and when there accumulates to said Trustees the sum of $40,000.00 in cash, over and above any reasonable loans or financial requirements made by said Trustees to Brock & Spight and the Home Oil Mill, as hereinafter provided for, that said Trustees promptly proceed to a partial division and distribution of at least $40,000.00 among the legatees and beneficiaries in the percentages and proportions specified in this Item.'

"The Trustees are given the full right to adjust and compromise all debts and obligations due W. R. Spight at the time of his death, and which debts and obligations were willed to the Trustees under the Will.

"The Trustees are given full authority of disposition of the Estate as shown by the above quoted excerpts from said Will.

"Likewise, the Trustees are given full authority to operate all businesses owned by W. R. Spight at the time of his death, with authority to invest and reinvest the corpus and income of the Trust property.

"The Trustees are required to liquidate and dispose of all of the properties held by them in Trust within a period of twelve months from the date of the death of Mrs. Burr. The Trustees are required to keep accurate account of their administration of the Estate. The Will further provides as follows:

"'Said Trustees will promptly convert to cash, wherever practical, and feasible, the properties, real and personal, choses in action, hereby given and willed to them, and proceed with all reasonable dispatch to pay to the beneficiaries herein named the bequests made.

*** and the said Trustees are invested with the power, right and authority, and they are hereby directed, within one year after the death of my sister, Annie Lou Spight Burr, to make final distribution of said Trust Estate to the beneficiaries herein named by appraising all of the properties of such Residuary Estate and all increments thereof, and making division and distribution thereof to the beneficiaries hereunder, in kind; that is to say, the Trustees may grant, convey, transfer and assign to the respective beneficiaries herein named in the proportions fixed and prescribed in this Item, their respective interest in said properties in the proportions and percentages herein specified and fixed.'

"' *** Upon the delivery by my Executrix of the Residuary Estate to the said Trustee of "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," said Trustees are to execute to my Executrix, a written acceptance of their respective Trusteeships, and a full and complete acknowledgment from my Executrix of the properties given, willed, bequeathed and devised to them, and a full and complete release and discharge of my Executrix and my Estate, which said instrument is to be duly recorded in the Office of the Probate Judge of Morgan County, Alabama.'

"Item VII. of the Will nominates Mrs. Burr, as the Executrix, and invests her with very complete and plenary powers in her administration of the handling of the Estate, part of the provisions with reference to the Executrix being

"'It is my intention hereby to give to my said executrix subject to the aforesaid exceptions, full and absolute power to hold, manage, invest and distribute my estate as herein directed and any and all other powers necessary or convenient for that purpose, whether such powers are herein specifically set forth or not, such powers are hereby given to her.'

"Item VIII. appoints D. F. Green as Executrix, upon the death of Mrs. Burr.

"Item IX. provides for the payment of the legacies in the order made.

"Item X. retains Chas. H. Eyster as attorney to represent the Estate and the Executrix.

"These are all of the provisions of said Will.

"As stated this Will was duly probated in the office of the Probate Judge of Morgan County, Alabama on September 9th, and is of record in Will record No. 5 at page 540, et seq.

"The administration of the Spight Estate was removed from the Probate Court to the Circuit Court of Morgan County, Alabama, in

Equity, and the Executrix filed her report for final settlement in the Circuit Court of Morgan County, Alabama.

"The three Trustees named by Mr. Spight in his Will accepted the Trust, and a bill was filed by Mrs. Burr in the Circuit Court of Morgan County, Alabama, asking the Court to recognize the Trust and to assume jurisdiction of the Trustees in their management of the Trust Estate, the Will having provided that the Trustee of the 'W. R. Spight Religious and Charitable Trust' should make an annual report of their administration to the Circuit Court of Morgan County, Alabama.

"This decree of the Circuit Court of Morgan County, accepting supervision of the Trust was rendered on October 12, 1940, and is in part, as follows:

> "'It is therefore, ordered, adjudged and decreed by the Circuit Court of Morgan County, Alabama, in Equity, that said Court does hereby recognize and declare the creation and existence of the Trust Estate created by the said W. R. Spight in his will, namely, the 'W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST,' and the appointment and designation and acceptance of Mrs. Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees of the 'W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST,'

"The report of the Executrix for final settlement was set down for hearing on October 12, 1940, and upon the hearing of said report, the court made a decree passing and allowing the report. This decree on final settlement was rendered by the Circuit Court on the 12th day of October, 1940, and is in part as follows:

> "'IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that said account of the said Annie Lou Spight Burr, as Executrix of the last Will and Testament of W. R. Spight, deceased, be, and the same is hereby passed and allowed:
>
> "'And it appearing to the Court that under the provisions, terms and conditions of the last Will and Testament of W. R. Spight, deceased, that the residuum of his Estate, as found and ascertained by this Court as above stated, was given, willed, bequeathed and devised by the said W. R. Spight, under his last Will and Testament to Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees of the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST,"
>
> "'It is further ordered, adjudged and decreed that the said Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees, are entitled to said amounts, namely, $60,589.28 General Fund, and $118.87, Cornelian Court Hotel Building Fund, and all of the real, personal and mixed properties and choses in action, itemized in Paragraph numbered 29 hereof, (said items including the amount of cash), and any and all other properties, real, personal and mixed, and choses in action belonging to or in which the said W. R. Spight Estate has any right, title, claim or interest or any equity in or to,

wherever located, so as to vest the said Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees of the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," with fee simple title thereto.

"'IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Executrix deliver to, transfer, assign and convey to the said Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustee of the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," the sum of $60,589.24 from the General Fund, and the sum of $118.87 Cornelian Court Hotel Building Fund, and all of the real, personal and mixed properties and choses in action described in Paragraph No. 29 hereof, and any and all other properties, real, personal and mixed and choses in action belonging to or in which the said W. R. Spight Estate has any right, title, claim or interest or equity in or to, wherever located, so as to vest the said Annie Lou Spight Burr, D. F. Green and J. H. Johnson, as Trustees of the "W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST," with the fee simple title thereto.

"'The Executrix on the payment of the amounts hereinabove provided, and upon compliance with this decree, shall make report to this Court of her compliance therewith, and upon such report, it is

"'ORDERED, ADJUDGED AND DECREED that the said Executrix, Annie Lou Spight Burr be, and she is hereby discharged.

"'IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the report and account of said Executrix be recorded.'

"The Executrix, Mrs. Burr, has executed a deed to Mrs. Burr, Mr. Green and Mr. Johnson, as Trustees of the 'W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST,' and has presented the deed to me for filing and recording, and the question arises whether or not the privilege or license tax should be paid.

"It is the position of Mrs. Burr, as Executrix, and of Mrs. Burr, Mr. Green and Mr. Johnson, as Trustees of the 'W. R. SPIGHT RELIGIOUS AND CHARITABLE TRUST,' that they are not due to pay a privilege or license tax on this deed.

"I wish to request your opinion on whether or not privilege or license tax should be paid on this deed."

From the above, it appears that the testator, Spight, devised and bequeathed his residuary estate in trust to certain trustees to hold, manage and from time to time distribute the same in accordance with testamentary directions.

Legal title to said residuary estate therefore vested upon the instant of his death in said trustees, subject only to interception for certain purposes

by his personal representative, under the statutes. Code, 1923, Sections 5821, 5846, 5847, 5883.

Powell v. Labry, 210 Ala. 248, 251, 97 So. 707;

N. C. & St. L. R. Co. v. Karthans, 150 Ala. 633, 43 So. 791;

Brown v. Mize, 119 Ala. 10, 20, 24 So. 453;

Baldwin v. Alexander, 145 Ala. 186, 191, 40 So. 391;

L. & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 153;

Stovall v. Clay, 108 Ala. 105, 20 So. 387;

Banks v. Speers, 103 Ala. 436, 16 So. 25;

Calhoun v. Fletcher, 63 Ala. 580;

Leatherwood v. Sullivan, 81 Ala. 463, 1 So. 718.

The deed subsequently executed by the executrix, pursuant to a decree rendered during the course of administration of the estate, was executed evidently for a nominal consideration for the purpose of perfecting title to the real estate belonging to said residuary estate, and was not therefore subject to the deed filing tax imposed by Schedule 46 of Section 348 of the Revenue Act of 1935 (General Acts, 1935, page 456), successor to Section 21½ of the Revenue Act of 1927 (General Acts, 1927, page 163).

The deed of the executrix added nothing to the legal title of the trustees already vested, **eo instante** upon death of the testator. Authorities supra. It operates only to confirm and establish of record such previously vested legal title.

The situation is to be distinguished from that considered in a former opinion of this office under date of August 17, 1937, to Hon. John T. Frazer, Judge of Probate, Lee County (Quarterly Report of Attorney General, Vol. VIII, page 132). From that opinion it appears that the testator had in effect devised his estate to his executors in trust for the benefit of certain named beneficiaries, and that under the will it was necessary for the executors to execute deeds to the beneficiaries in order to divest themselves of legal title and vest the same in the beneficiaries. The opinion was expressly rested upon the premise that legal title "had apparently remained in the executors" until execution of their deeds to the beneficiaries. Such is not the case in the present instance. As we have seen, legal title has been in the trustees continuously since testator's death, without interruption or interception by the executrix at any time. The executrix has executed her deed merely to quiet that title and place the same beyond the pale of controversy in the future.

It is the conveyance of legal title, whether of real or personal property, that fixes the basis for the deed filing tax under the Revenue Act of 1935, Schedule 46, Section 348, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 1, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Tobacco Tax—

1. Where wholesaler or jobber purchasing tobacco stamps on consignment refuses or fails to remit in the time allowed, he must forfeit commission or discount on stamps, and the Department of Revenue has no authority to waive such forfeiture.

2. The forfeiture of commission applies only to those stamps on which payment is due during the month, and for which there is a failure or refusal to account or remit in the time allowed.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of February 11, 1941, is as follows:

"Will you please give me your official opinion on the following questions:

"Section 11 of Schedule 159 of Section 348 of the 1935 Revenue Act is in part as follows:

" 'Every wholesaler or jobber purchasing stamps on consignment as described herein, shall be required to make a full and complete accounting and remittance on or before the tenth of each month for all stamps used on taxable tobaccos during the preceding months. Every wholesaler or jobber refusing or failing to comply with this section shall forfeit the commission or discount on stamps used which he failed or refused to account or remit for in the time allowed, and in addition shall be charged

interest on such delinquent amount for each day delinquent at the rate of eight (8) per cent per annum.'

"The word 'shall' being used in the foregoing quotation with reference to the forfeiture of commission indicates that it was the legislative intent that the forfeiture be mandatory. There appears to be some doubt, however, as to whether or not this provision necessitates mandatory action upon the part of the Department of Revenue to enforce the forfeiture. It would be appreciated if you would advise whether or not in your opinion this provision makes it mandatory upon the Department of Revenue to enforce the forfeiture of the commissions of those failing to comply with the requirement relative to reporting and accounting for stamps purchased on consignment.

"It would also be appreciated if you would advise whether or not the forfeiture of commission applies to all stamps consigned during the month or only those on which payment is due during the month."

In answer to your first inquiry, it is my opinion that it is mandatory upon the Department of Revenue to enforce the forfeiture of the commissions of those failing to comply with the requirement relative to reporting and accounting for stamps purchased on consignment.

I recognize the fact that there is no universal rule or absolute test by which it can be positively determined whether a provision in a statute is mandatory or directory. However, in the determination of that question, as of every other question of statutory construction, the prime object is to ascertain the Legislative intent as disclosed by the terms and provisions of the Act in relation to the subject of legislation, and by a consideration of the nature of the Act, the general object to be accomplished, and the consequences that will result from construing the particular statute in one way or another. 59 C. J. 1072, Section 631; 25 R.C.L. 767, Section 14.

As a general rule, the word "shall" when used in a statute is imperative, and operates to impose a duty upon the officer directed to perform it. 59 C. J. 1079, Section 635; 57 C. J. 547. In the Revenue Act of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256), the word "shall" is used in almost every section, and it is apparent that it is employed indiscriminately in both the imperative and permissive sense.

However, in Sub-section 11 of Schedule 159 of Section 348, which you quote in your letter of inquiry, it appears to be the intention of the Legislature that the word "shall," as therein used, should be construed as mandatory, rather than directory. I reach this conclusion for the reasen that Sub-section 11 of Schedule 159 contains a departure from the routine prescribed for the handling of tobacco tax stamps elsewhere in Schedule 159. The wholesaler or jobber is given the option of purchasing stamps on consignment, and is given a discount or commission on the stamps as purchased, but he is required (and this requirement is, in my opinion, in the nature of a condition to his receiving such discount or commission) to make a full and complete accounting and remittance on or before the 10th of each month for all stamps used on taxable tobaccos during the preceding month. If he fails in this regard, the Act clearly says that he shall forfeit his commission or discount.

Although in other sub-sections of Schedule 159 provision is contained for the Department of Revenue to waive or remit penalties imposed by such sections (See sub-sections 12 and 15), no such provision is made in Sub-section 11. This provision for a forfeiture of commission or discount being penal in nature, it is my opinion that there is no authority for the Department of Revenue to waive it. 59 C. J. 1072, et seq., Section 631, N. 48, 51, 56; 25 R.C.L. 767, et seq., Sections 16, 17, 18.

In answer to your second inquiry, you are advised that the forfeiture of commission applies only to those stamps on which payment is due during the month, and for which there is a failure or refusal to account or remit in the time allowed. I find no intention to forfeit the commission upon all stamps consigned. Sub-section 11, you will note, requires the wholesaler or jobber to make his accounting and remittance on or before the 10th of each month "for all stamps **used** on taxable tobaccos during the preceding month." The forfeiture provided is "the commission or discount on stamps **used which he failed or refused to account or remit for in the time allowed.**" The accounting is for stamps used. The forfeiture is on stamps used, for which there is a failure or refusal to account or remit for in the time allowed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 3, 1941.

Hon. Irby Pope,
Judge of Probate,
Perry County,
Marion, Alabama.

Licenses—Tobacco Dealers—

Wholesale dealer selling, or offering for sale, tobacco products in several counties is liable for license prescribed by Schedule 33, Section 348, Revenue Laws, 1935, in each county in which he does business.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of November 29, 1940, is as follows:

"A few weeks ago I wrote you and requested your opinion as to whether a Wholesaler, with a place of business in Selma, and sold tobacco products in Perry County, with no established place of business in Perry

County, would be due to pay the $5.00 mentioned in Schedule 33 of the Revenue Code.

"You acknowledged my request, for which I thank you. But, since then, a firm in Selma, which paid the $5.00 license, has filed a petition for refund of that amount with my office, and as it will have to be refunded by Perry County, I am again asking you to refer to the matter. The Selma firm in making the petition, referred me to Vol. XVII, Attorney General's Reports, page 340. I notice in that opinion that you say a Wholesaler of tobacco, who has procured a license in Montgomery County under No. 33, and maintains an established place of business in Dallas County, would be required to pay $5.00 in both counties, and in addition, he would have to pay a State License of $100.00, regardless of number of counties in which he does business, and how many established places of business are maintained by such dealer.

"Of course, I have tried to make it plain that my problem does not apply to a dealer with an established place of business in Dallas and Perry Counties, but one who has his place of business in Dallas County, and sells tobacco products to retailers in Perry County."

The pertinent part of the request to which you refer in your present letter is as follows:

"First: Schedule 33 of Revenue Laws of Alabama, Simons' Code, 1936 edition, amended, says that each wholesale dealer in Cigars, etc. shall pay one privilege license to the State of $100.00, and $5.00 to each county in which he does business. In Attorney General's Opinions, Quarterly Report Vol. 1, p. 134; Vol. 2, p. 3, it is clearly stated that wholesale tobacco dealers are liable for one State license of $100.00, and $5.00 to each county in which he does business. However, there has been much misunderstanding in this County as to whether firms just taking orders from stores, and shipping the goods by common carrier, not the firm's truck, are due the $5.00 license to the county, even though they have paid the $100.00 license to the State."

In your letter under date of November 29, 1940, you refer to an opinion of the Attorney General reported in Vol. XVII, page 340 of the Quarterly Reports of Opinions of the Attorney General. You are correct in your statement that the opinion referred to by you is based upon an entirely different state of facts from that set out in your request under date of October 10, 1940, and that it does not answer the question now propounded by you.

The provisions of the Revenue Act of 1935 which covers your instant case is Schedule 33 of Section 348, (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, p. 256). This Schedule is as follows:

"Schedule 33. Each wholesale dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff or any substitute therefor, either or all, shall pay one privilege license to the State of One Hundred Dollars ($100.00), and Five Dollars ($5.00) to each county in which such wholesale dealer does business. **The phrase 'wholesale dealer'**

as used in this Schedule shall include persons, firms, corporations, culbs, or associations who shall sell and/or store, or offer to sell any one or more of the articles enumerated herein to retail dealers for the purpose of resale only. The privilege license herein levied shall be in addition to the sales tax as provided in Schedule 159." (Emphasis supplied)

It is my opinion that, under the facts detailed in your letter of inquiry, the wholesale dealer there described is subject to the $5.00 license imposed by Schedule 33 upon his activity in Perry County.

The party described is without question a "wholesale dealer" within the definition of that term in Schedule 33, for he is selling or "offering to sell" in Perry County one or more of the articles enumerated in said Schedule.

While a more difficult question arises in the determination of whether such person as a wholesale dealer "does business" in Perry County within the meaning of that term as employed in Schedule 33, I am of the opinion that it was the intention of the Legislature to include within such term the activity engaged in by the person in question.

You will note that, by Schedule 33, "each wholesale dealer" is required to pay a privilege license of $5.00 "to each county in which such wholesale dealer does business". The Schedule then proceeds to define the phrase "wholesale dealer" as including persons, etc. who shall "sell and/or store, or offer to sell" the articles named, in the manner described. This, then, is the business in which "wholesale dealer" is engaged, i. e., the selling, storing, or offering to sell the described merchandise. Since the party described in your inquiry is selling or offering to sell the products named in Schedule 33 in Perry County, he, therefore, "does business" in Perry County. Being a "wholesale dealer" within the definition of Schedule 33, and "doing business" within the contemplation of such Schedule, the party in question must pay in Perry County the license prescribed thereby. The fact that the goods are delivered to the purchaser by common carrier is therefore immaterial, as the party sells or at least offers for sale in Perry County the commodities mentioned in said Schedule 33, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 4, 1941.

Hon. E. W. Vance, Member,
Board of Revenue,
Barbour County,
Eufaula, Alabama.

Counties—Road and Bridge Fund — Gasoline Fund — General Fund—

County may transfer funds from the General Fund to the County Gasoline & Oil Fund, or the Road & Bridge Fund, provided there is a surplus in the General Fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of February 20, 1941, in which you request my official opinion as follows:

"Our Barbour County Board of Revenue has tried—and is trying hard, to keep track of its expenditures, and its income. We believe that we have our revenues and expenses in as complete condition as is possible. In fact we are proud of our record. All of our indebtedness of the **General Fund** is set up serially and is being paid as they mature. All County expenses are being paid **promptly.** On September 30th., 1940, there was a balance in this fund of $10,873.01.

"Our County road forces are doing good work in keeping up our roads, and we have found out upon careful investigation that we can save a great deal of money by **making our own concrete pipe.** It takes a lot of this pipe in Barbour, and in many of the roads that our own forces have to keep up—we have ascertained upon investigation that we **can save much money.** Hence—it has been determined that it is a wise move—**to have our own pipe.** It will cost several thousand dollars to purchase the material and forms necessary to put the proposed plant in operation.

"By direction of the Board I am asking your office if there is any law that would prohibit the **transfer** of the sum of $5000.00 out of the balance of the General Fund surplus—to the Gas and Oil Fund to set up the concrete pipe making plant which will save the County a **considerable sum of money each year.**

"There is so much merit in the County making its own concrete pipe—that we are anxious to do so, and we have the money in the surplus fund, with which to proceed, but we felt that it was necessary to have an opinion from your office to the effect that the transfer of $5000.00 from one fund to another was necessary. We do hope you will approve it."

This office has heretofore ruled that funds may be transferred from the General Fund to the Gasoline & Oil Fund (Quarterly Report of Attorney General, Vol. IX, page 112), or to the Road and Bridge Fund, provided there is a surplus in the General Fund. In this connection, I quote in extenso from an opinion rendered to Hon. Frank O. Deese, Judge of Probate, Dale County, under date of September 21, 1939, which opinion appears in the Quarterly Report of the Attorney General, Vol. XVI, page 262:

"It is my opinion that Section 1397 (115) of Michie's Code of 1928 answers your request. This section is as follows:

"'1397 (115). Surplus from general fund of county transferred to road fund.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties.'

"Of course, there are certain restrictions thrown around such a transfer. In the case of **Rhodes v. Marengo County Bank,** 205 Ala. 667,' 88 So. 850, our Supreme Court lays down the following rule:

"'While Act Sept. 22, 1915 (Laws 1915, p. 573), authorizes the transfer of any surplus of the general fund to road fund, a transfer of a portion of the general fund to the road fund cannot be justified under that act, where the county was much indebted, and there were warrants having priority unpaid.'

"The above simply means that you cannot make such a transfer from the general fund to the road and bridge fund of your county where by so doing you are likely to impair the general fund to such an extent that warrants having priority could not be paid. In other words there cannot be said to be a surplus in the general fund until all preferred claims against the county, and all appropriations which the law makes mandatory have been paid, or adequate funds are on hand sufficient to meet all preferred claims. After this has been done, if a surplus remains, the court of county commissioners may lawfully transfer any such surplus to the road fund to be used as provided by law. See Biennial Report of Attorney General, 1930-32, p. 446; **Ramage Park & Co., v. Folmar,** 214 Ala. 661, 108 So. 580.

"There must be strict compliance with the fore-going or else no such transfer is lawful. **Rhodes v. Marengo County Bank,** supra; **Mims, Treasurer v. Stallworth,** 180 Ala. 511, 61 So. 811."

It can be seen from the above quoted excerpt that certain restrictions are placed upon counties before funds may be transferred from the General Fund to the road funds of the county. However, if there is an actual surplus measured by the rule laid down hereinabove in the General Fund of your County, I know of no law which would prohibit the transfer of funds from the General Fund to the Gasoline & Oil Fund of your County, for the purposes set out in your request. However, it must be born in mind that all of the concrete pipes made by your County should be used for road and bridge purposes of the County. You, of course, understand that a county may not go into the business of manufacturing pipes for the use of any other person, firm or corporation.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 4, 1941.

Mrs. Edna N. Dunn,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Judges of Probate—

The decision in the case of **Houston County Board of Revenue v. Poyner,** 236 Ala. 384, 182 So. 455, holding that Sections 370-A and 370-B of the Revenue Act of 1935 invalid as being violative of Section 45 of the Constitution of 1901, is applicable to subsequently elected judges of probate.

Opinion by Assistant Attorney General Screws.

Dear Mrs. Dunn:

Your letter of February 25, 1941, in which you request an official opinion, is as follows:

"Please advise whether the opinion of the Supreme Court of Alabama, October Term, 1937-38, in the case of Houston County Board of Revenue vs. Saxon P. Poyner, an appeal from the Houston Circuit Court in Equity, nullified that part of the 1935 Revenue Act and a 1937 amendment, that fixed the salaries and fees of the Probate Judges, for those elected subsequent to the said opinion."

I am of the opinion your inquiry should be answered in the affirmative.

In the case of **Houston County Board of Revenue v. Poyner,** 236 Ala. 384, 182 So. 455, our Supreme Court held that Sections 370-A and 370-B of the Revenue Act of 1935 were invalid as being violative of Section 45 of the Constitution of 1901. Said sections are, therefore, invalid for all purposes. They are not merely inoperative as to the then incumbent probate judges, which would have been the case if it had been decided that said sections were violative only of Section 150 and/or 281 of our present Constitution. Cf. **Ex parte Houston County et. al., Poyner v. Houston County et al.,** 235 Ala. 304, **178 So. 535.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 4, 1941.

Hon. B. L. Cole, Chairman,
Russell County Commission,
Phenix City, Alabama.

Counties—Attorneys—

A county is not authorized to pay the compensation of an attorney employed by a taxpayer in an injunction suit against the county governing body involving the issuance of county warrants.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of February 24, 1941, in which you request an official opinion, is as follows:

"As Chairman of the County Commission of Russell County, please advise me as to the following state of facts:

"1. In August 1940 the old county commission advertised and attempted to issue $25,000.00 in gas tax warrants at 5%.

"2. A tax payer filed an injunction against this issue and said warrants were not issued, which was a saving to the taxpayers of Russell County.

"Quare: Can the County Commission pay the attorney's fees for the tax payer in view of the saving? The old Commission entered into an agreement with the tax payer (Complainant), in the injunction proceedings and agreed not to contest the injunction and the warrants were not issued.

"The Court costs in the chancery court being $22.15 and the Attorney's being $100.00."

I am of the opinion that your inquiry should be answered in the negative. The authority for counties to employ attorneys is found in subdivision 8 of Section 5498 of the Code of Alabama, 1923, which, after requiring certain duties on the part of solicitors, further provides as follows:

"But courts of county commissioners or boards of revenue may retain or employ attorneys when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand or petit jurors."

Under this subsection, county commissioners had authority to employ and pay counsel for their services at their discretion, when deemed advisable or necessary in the "administration of county affairs." **Stone v. State,** 220 Ala. 437, 125 So. 653; **Clark v. Egerton,** 207 Ala. 491, 93 So. 455.

The facts outlined in your letter of inquiry do not fall within the rule above set out. In the instant case, the attorney was employed by the taxpayer and not by the county. It, therefore follows, that the county is without authority to pay for the services of the attorney in question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 4, 1941.

Hon. T. A. Barnett,
Tax Collector,
Walker County,
Jasper, Alabama.

Taxation—Exemptions—Section 91, Constitution of 1901—

Property used exclusively for religious worship, for schools, or for purposes purely charitable is exempt from taxation under the provision of Section 91, Constitution of 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of February 24, 1941, in which you request my official opinion as follows:

"Re: Cheatham Conservatory Tax.

"We have in our city a building which has for several years been used as a school for teaching music during week days and as a Church on Sundays. For some time the owners paid tax on this building. Later, being advised by their lawyer, they applied to the State Tax Commission for re-imbursement and were granted same. Very little revenue has been realized from this building and that received was applied on the up-keep of the building.

"The State examiner would not grant this tax exemption, due to the small amount of revenue received by Mrs. Ponder, the owner of the building.

"Will you please advise if this property is exempt from taxes?"

My answer to your inquiry is in the affirmative.

Section 91 of the Constitution, 1901, reads as follows:

"Section 91. The Legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries, nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

It will be noted from the above quoted Constitutional section, that all property used exclusively for religious worship, for schools, or for purely charitable purposes, shall be exempt from ad valorem taxation.

The Supreme Court of this State has on several occasions held that the use of the property is the criterion for measuring the exemption from taxation, and that the ownership of such property is immaterial.

Anniston City Land Co. vs. State, 160 Ala. 253, 48 So. 659;

State, et al. vs. Church of the Advent, 208 Ala. 632, 95 So. 3;

Gay, et al. vs. State, et. al., 228 Ala. 253, 153 So. 767;

Quarterly Report of Attorney General, Vol. III, page 155;

Biennial Report of Attorney General, 1936-38, page 330.

As it will be readily seen that if the ownership of property is immaterial in determining whether such property is exempt from taxation under the provision of Section 91, supra, it necessarily follows that the amount of income received from such property is also immaterial.

You are advised that in my opinion the property mentioned in your inquiry, if the same is used exclusively for religious worship and school purposes, is exempt from ad valorem taxation as provided in said Section 91 of the Constitution of 1901. The fact that Mrs. Ponder, the owner of this property, receives a small amount of revenue from this property does not affect the exemption of this property from taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 5, 1941.

Hon. C. H. Keller, Register,
Circuit Court of Cullman County,
Cullman, Alabama.

Costs on dismissal of suit—

When a bill is filed on the equity side of the docket in the Circuit Court and this bill on hearing is dismissed and the plaintiff is taxed with all costs of the case up to and including the dismissal, if this order of the Court stands it becomes judgment for costs up to and including the time of dismissal on which execution may issue.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 26, 1941, in which you request an official opinion, is as follows:

"I will thank you to let me have your opinion in regard to Court cost in the following case:

"A bill was filed on the equity side of the docket to enforce a materialman's lien. The case was dismissed by the Court on the pleadings and proof and the cost taxed against the complainant. Thereafter the complainant filed a supplemental bill of complaint in the nature of an original bill, as is provided by the code. Would the filing of the supplemental bill supersede the order taxing the cost in such a way that the complainant would not be liable for the cost until the final decree was rendered on the supplemental bill, or would the complainant in this case be liable for the cost of the first order notwithstanding the filing of the supplemental bill?"

According to your statement, the complainant was taxed with all the costs up to and including the dismissal of the original bill. This being true, the costs up to this time became a charge against him, no matter how the second case may finally be determined. This is true, of course, unless the Court changes its order.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 5, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Exemptions—Section 91, Constitution of 1901—

Property owner by a church, which is rented out and not used exclusively for religious purposes, is not exempt from taxation under the provisions of Section 91, Constitution of 1901.

Opinion by Asssitant Attorney General McQueen.

Dear Sir:

I have your letter of February 24, 1941, in which you request my official opinion as follows:

"The South Elyton Negro Baptist Church owns the following:

"Lots 1-2 blk 1 Sessions Land Company Sub-div.

"The church sits crosswise on the front of these lots and a house in the rear of the church is rented to a deacon and the pastor lives with the deacon. As I understand it, the deacon pays rent and the pastor pays the deacon board.

"Please advise me if this property comes under Section 91 of the Constitution exempting churches?"

It is my opinion that the property which you have described in your letter is not exempt from ad valorem taxation.

I wish to call your attention to subsection (a) of Section 2 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), as amended by Act No. 84, S. 43, approved February 9, 1937 (General Acts, 1936-37, page 95), which reads in pertinent part as follows:

"Section 2. PERSONS AND PROPERTY.—The following property and persons shall be exempt from ad valorem taxation and none other: * * * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable, **provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes;** * * * *" (Emphasis supplied)

The right of the Legislature to limit the exemption of property owned by religious, educational and charitable institutions to that property which is used exclusively by them has been definitely determined by the Supreme Court of Alabama in the case of **State et al. v. Church of the Advent**, 208 Ala. 632, 95 So. 3.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 6, 1941

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Exemption—Railroads—

Section 143 of the Revenue Act of 1935 levying a certain tax on railroads, and the proviso thereof which affords an exemption to certain classes of railroads discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"In a report of the examination of the Public Utilities Division of the State Department of Revenue covering the period from September 30, 1922 to February 21, 1940, which was dated March 22, 1940, and released to this office on April 25, 1940, there were set up certain surcharges described in Schedules 16, 17, 18, 19, 20 and 21 totaling $159,740.14. All of these items represent amounts which the examiners of accounts have claimed to be due under the provisions of Section 143 of the 1935 Revenue Act, which is the same as Section 2 of the 1927 Revenue Act (H. B. 349). These charges apparently arise from the interpretations which the examiners have seen fit to place upon this section of the law, which interpretations are not in agreement with the interpretations under which the act has been administered since its inception in 1927.

"The charges having been set up, however, it becomes my duty to ascertain whether or not the interpretation of the act by the examiners is the same interpretation which would be placed upon the act by the Legal Department of the State. Before proceeding with any action seek-

ing to recover the charges set up by the examiners described in said schedules I find it necessary to ask your opinion upon the following questions:

"1. Section 143 is in part as follows:

" 'Provided, however, that this Section shall not apply to what is commonly known and called street railways, or to any independently owned and operated railroad whose gross receipts did not exceed three hundred thousand dollars during the preceding year, or which is less than fifteen miles in length, when such railroad is not owned, operated or controlled directly or indirectly by any other railroad corporation, and if one line of railroad is owned, controlled or operated by another railroad company owning, operating or controlling railroad trackage within this State then the gross intrastate receipts and mileage during the preceding fiscal year of both or all of such lines shall be added together to determine whether any of such lines are within the exception.'

"There are several railroads operating within the State which own all or a majority of the common stock of other railroad companies operating within the State. In each instance, however, each separate corporation operates as a separate corporation irrespective of the fact that the controlling interest in its stock is owned by another corporation. Does the fact of such majority stock ownership serve to take the owning railroad company or the owned railroad company out from under the exemption provision above quoted? For your full consideration of this question I have attached hereto a memorandum setting forth a detail of the ownership of the several railroads coming in this classification as it appears from the records in this office.

"2. Does the term 'whose gross receipts did not exceed three hundred thousand dollars during the preceding year' have reference to the gross receipts from all sources including interstate operations and operations outside of the State of Alabama or does it apply to gross receipts from intrastate business only?

"3. In computing the tax due by a person engaged in the business of operating a railroad under the provisions of this section is the taxpayer entitled to have deducted from his gross receipts the sum of $300,000 before beginning the computation of the tax? In other words, is the tax merely measured by the receipts above $300,000 or on the total receipts from intrastate operations, when the total receipts from such intrastate operations exceed $300,000?

"4. In determining the measure of the tax which is based upon 'the gross receipts of such railroad from all intrastate business of such railroad within the State of Alabama during the preceding year; the gross intrastate earnings to be determined by the amount received from intrastate business and from business originating at points in Alabama destined to other points in Alabama, although carried through another State, said last named earnings to be apportioned on the basis of earnings per mile carried,' would the taxpayer be entitled to have deducted re-

ceipts from United States mail, from freight and passengers receipts from transportation of freight or passengers of the United States Government, switch revenues, rentals, express revenues, baggage revenues, dining and buffet car revenues, and demurrage revenues, or does the term 'intrastate business' have reference to all operations of the railroad including the above named items?

"Please give us your opinion upon these questions."

We also have a supplemental letter to the above request from you, which is as follows:

"Supplementing my request of May 9th with regard to the provisions of Section 143 of the 1935 Revenue Act, it has developed that one of the railroads covered by the first question set out in that request is and has been operated for some time by a receiver appointed by the Federal Court. It is necessary, therefore, to amplify the first question by asking the further question as to whether or not the railroad operated by a receiver under the direction of the Court, although a majority of the stock is held by another railroad, would be considered as owned and operated by the railroad company owning the majority of its stock."

Your inquiries pertain to an interpretation of Section 143 of the Revenue Act of 1935. Said section levies a tax on all railroads and the proviso thereof quoted in your request affords an exemption to those railroads which come within the exemption therein laid down. This proviso is ambiguous, conflicting and confusing and it is necessary to ascertain the true legislative intent in order to determine a correct construction thereof.

Your first inquiry presents a question as to what classes of railroads are within the exemption. In other words, if a railroad is owned, operated **or** controlled directly or indirectly by another railroad, is the exemption nullified as to such railroad? This question is not free from doubt in view of the ambiguity of the proviso in question. Therefore, as above stated, it is necessary to arrive at the true legislative intent in order to ascertain the correct answer.

Section 143 of the Revenue Act of 1935, supra, first appeared in the Revenue Act of 1927, General Acts, 1927, page 139, as Section 2 thereof. The administrative construction by the then State Tax Commission placed on said Section 2, supra, was to the effect that the mere ownership of the stock of a railroad (within the gross receipt and track mileage classification) by another railroad would not place such railroad without the exemption. Said administrative construction was based on the theory of separate corporate entitles. It followed the general rule of law in this respect as laid down by our courts, to wit: Generally the fiction of a distinct corporate entity will be recognized to protect the corporation's business, but not a device for evading responsibility. Legal fiction of a distinct corporate existence may be disregarded where one corporation is merely an instrumentality or adjunct of another corporation. See **Ala. Dig.,** Corporations, Key No. 1, and cases cited thereunder. See also **Independent Gasoline Company v. Bureau of Unemploy-**

ment Compensation of Georgia (Georgia Supreme Court), 10 S. E. (2) 58. Said administrative construction determined that the legislative intent in enacting Section 2 was to tax all railroads and provide an exemption to the smaller railroads with the safeguard that a larger railroad should not be converted into several smaller railroads in order to procure the benefits of the exemption. Of course, if one railroad, though a separate corporate entity, was in fact an instrumentality, agent or adjunct of another corporation it would, of necessity, come without the exemption.

With the above administrative interpretation placed on Section 2 of the Revenue Act of 1927, supra, the Legislature enacted Section 143 of the Revenue Act of 1935, supra, in substantially the same language. This being the situation, I am constrained to hold that it was the true legislative intent in enacting Section 143 of the Revenue Act of 1935 to adopt the administrative construction placed on Section 2 of the Revenue Act of 1927, supra. See opinions to Hon. John C. Curry, Commissioner of Revenue, under date of February 21, 1941; **State v. H. M. Hobbie Grocery Company,** 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones,** 236 Ala. 310, 182 So. 452; and **Marie Walker Jones v. Roy Johnson, Tax Assessor,** (MS).

The question as to whether the exemption is applicable in each particular situation is, of course, one of fact which must be determined by the rules above set forth.

In a supplemental letter by you under date of July 2, you present a further question concerning the question of receivership due to the fact that one of the railroads in question is in the hands of the receiver. In this respect, I wish to refer you to to Section 377 of the Revenue Act of 1935, making the receiver subject to the same taxes as the corporation would have been. In view of the above interpretation placed on Section 143 of the Revenue Act of 1935, supra, it is not necessary to determine the effect of the mere ownership of the stock of a railroad in the hands of a receiver by another railroad, as said railroad in the hands of a receiver is not operated by a railroad owning said stock.

Answering your second inquiry, the statute lays down its own definition as to gross receipts upon which the tax is levied. It levies a tax "in a sum equal to 2½% of the gross receipts of such railroad **from all intrastate business of such railroad within the State of Alabama** during the preceding year." It further provides:

> " * * * * the gross intrastate earnings to be determined by the amount received from intrastate business and from business originating at points in Alabama destined to other points in Alabama, although carried through another state, said last named earnings to be apportioned on the basis of earnings per mile carried."

In my opinion, this same type of earnings is contemplated by the exemption provision that:

"This section shall not apply * * * * to any independently owned and operated railroad **whose gross receipts** do not exceed $300,000 during the preceding year * * * *."

Patently, the Legislature intended by the use of the term "gross receipts" in the exemption provision the same type of receipts as was dealt with in that provision of the section levying the tax.

In my opinion, your third inquiry must be answered in the negative. The statute does not undertake to levy a tax upon the corporations' earnings in excess of $300,000 of gross receipts. It levies a tax upon all the gross receipts of all corporations taxed, but excludes from the class of corporations taxed those whose gross receipts within the State of Alabama, as defined in the statute, do not exceed $300,000.

In my opinion, your fourth inquiry must be answered in the negative, that is to say, receipts from United States mail contracts from freight and passenger contracts, switch revenues, rentals, express revenues, baggage revenues, dining and buffet car revenues, and demurrage revenues should be included within the gross receipts upon which the tax is levied. See **San Francisco-Oakland Terminal Railways v. Johnson,** 210 Cal. 138, 291 P. 197; **State v. Chicago Rock Island and Pacific Railroad Company,** 181 Minn. 615, 232 N. W. 105, 233 N. W. 866, **Alward v. Johnson,** 282 U. S. 509.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1941.

Hon. Asa Rountree, Jr.,
Director of Airfield Development,
Aviation Commission,
Montgomery, Alabama.

Statute—Municipalities—Eminent Domain—Airports—

The rule that statutes are construed as having only prospective operation, unless intent to give them retroactive effect is expressly declared or necessarily implied, is applicable to Section 11 of Act No. 136, H. 288, approved March 10, 1931 (General Acts 1931, p. 200), which give municipalities the right of eminent domain in reference to airports.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of February 20, 1941, in which you request my official opinion as follows:

"Section 11 of House Bill 288, found on page 200 of the 1931 General Acts of Alabama, Regular Session, reads as follows:

"Section 11. MUNICIPAL AIRPORTS; AIR RIGHTS; OBSTRUCTIONS; ABATEMENT; EMINENT DOMAIN. Any municipality of this State which has established and is operating a municipal airport shall have the power and authority to condemn, or acquire by purchase or gift, the right to abate or remove, any structure, building, tower, pole, wire, tree, woods, or other thing, or portion thereof, located within one-quarter of a mile of such airport, which the governing body of such municipality shall determine to constitute a menace to the safety of aircraft using such airport, including the right or ingress to and egress from the land upon which such structure, building, tower, pole, wire, tree, woods or other things exists, for the purpose of such abatement or removal. In addition to the foregoing power and authority, any such municipality shall also have the power and authority to condemn, or acquire by purchase or gift, the right to the unobstructed use of such portion of the air space above lands within one-quarter of a mile of such airport as the governing body of such municipality may determine to be necessary for the safe landing and taking off of aircraft utilizing such airport. Such municipality shall have the further power and authority to acquire by purchase or gift, or to condemn, for a term of years or perpetually, the right to place and maintain, obstruction markers and/or lights upon any structure, building, tower, pole, wire, tree, woods, or other thing, located within one-quarter of a mile of such airport which the council shall determine to constitute a menace to the safety of aerial navigation to or from such airport, including the right to lay and maintain conduits and wires to such obstruction markers and/or lights. Proceedings for the condemnation of any of the rights mentioned in this section shall be governed in all respects by the laws of this State applicable to the condemnation by such City of easements in land for public purposes.

"Please give me your opinion on the following question:

"1. Does the above named section apply only to a municipality with a municipal airport established and in operation at the time of its passage?

"2. Does a municipality which now establishes and puts into operation a municipal airport have the power and authority granted by this section, though it had no municipal airport at the time of the passage of the act of which this section is a part?"

In reply to your inquiry, it is my opinion that Section 11 of Act No. 136, H. 288, approved March 10, 1931, (General Acts, 1931, p. 197), the same being set out in your request, is applicable to any municipality which has estab-

lished and is operating a municipal airport, regardless of whether such airport was established and in operation at the time of the passage of the Act or at any time subsequent thereto.

A general consideration of the entire Act fails to reveal any verbiage or terminology which might be construed to place the Act in the category of retroactive or retrospective legislation.

It is a general rule that retrospective or retroactive legislation is not favored—"Hence it is a well settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction, supported and established by numerous judicial decisions, that statutes are not to be construed as having a retroactive effect. Both the above statements and rules are, of course, contingent upon the absence of any words expressing a contrary intention. In every case of doubt, the doubt must be solved against the retrospective effect and in favor of prospective construction only". 59 C. J. Section 692, Page 1159.

This general rule has found application in Alabama since its earliest courts. See **Davis, et al. vs. Branch Bank of Mobile,** 12 Ala. 463.

This rule still finds application in our courts and is expressly upheld. **Hawkins, Tax Collector vs. People's Finance and Thrift Company,** 219 Ala. 558, 122 So. 650. In this case it is expressly stated that "It is the general rule of statutory construction that statutes are to be construed as having only prospective operation, unless the purposes and intent of the Legislature to give them a retroactive effect is expressly declared or is necessarily implied from the language used". (See cases cited therein.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1941.

Hon. Addie Lee Farish,
Superintendent of Banks and
Director of Commerce,
State of Alabama,
Capitol.

Bureau of Insurance—Examination of Foreign Insurance Companies—Expenses of Examiners—

1. Section 8337 of the Code of Alabama, 1923, as amended by Act No. 527, H. 771, approved September 21, 1939 (General Acts 1939, page 818), construed.

2. Vouchers not required to be attached to sworn itemized statement presented by Superintendent of Insurance to Foreign Insurance Company for reimbursement of necessary expenses incurred by person or persons examining such company.

3. Vouchers need not accompany itemized sworn statement presented State Treasurer for reimbursement of expenses incurred by person or persons incurred while examining a foreign insurance company.

Opinion by Assistant Attorney General Russell.

Dear Madam:

Your request for official opinion dated February 18, 1941, follows:

"Re: Section 8337, Code of Alabama, 1923, as amended, Alabama General Laws, Regular Session 1939, H. B. 771—Hodo.

"Section 8337, as amended, provides for the examination of any insurance company organized under the laws of any other State or County, and qualified to do business in the State of Alabama, and further provides for the mode of payment of the expenses of such examination.

"Will you please advise me of the following questions:

"1—Under the provisions of the captioned section, as amended, is the Bureau of Insurance of the Department of Commerce, authorized to demand of the examined corportion payment to the office of the State Treasurer of the expenses of such examination provided in said section, such demand supported only by the itemized statement of such expenses, verified by the person incurring the same, but unaccompanied by voucher representing such payment?

"2—If payment of such expenses be made to the State Treasurer on the demand outlined in the preceding paragraph, is the State Treasurer, upon being billed by the Bureau of Insurance of the Department of Commerce and the filing with the State Treasurer of such itemized, verified account **without supporting vouchers,** authorized to reimburse the person incurring such expense for the actual amount thereof, as shown by such verified, itemized account?"

In answer to your first inquiry I call attention to Section 8337 of the Code of Alabama, 1923, as amended by Act No. 527, H. 771, approved September 21, 1939 (General Acts, 1939, page 818). Said section is as follows:

"That Section 8337 of the Code of Alabama is amended to read as follows: Section 8337—When the Superintendent of Insurance deems it necessary to examine any insurance company organized under the laws

of any other state or country, and herein designated and called a foreign company, such examination shall be made by the Superintendent of Insurance, or the actuary, or the examiners or accountants, or by examiners or accountants as he may deem necessary to appoint. **Any foreign company examined under the provisions of this Article shall pay to the office of the State Treasurer the actual railroad fare involved and in addition hotel bills and other actual and necessary expenses of the person or persons making such examination, not to exceed eight dollars ($8.00) per day per person, upon demand of the Superintendent of Insurance supported by an itemized statement of such expenses, duly sworn to by each such person, and in addition thereto** shall pay to the office of the Superintendent of Insurance a per diem of not in excess of $25.00 for the time actually spent by the actuary and not in excess of $25.00 per day for each examiner or accountant appointed to assist in the making of such examination, including time necessarily spent in traveling to or from the place of such examination. **All sums paid by such foreign company on account of such expenses or such per diem to the office of the Superintendent of Insurance shall be covered into the State Treasury, and the State Treasurer, upon being billed by the Bureau of Insurance of the Department of Commerce and the filing with the State Treasurer of an itemized, verified statement of expenses, shall reimburse the persons incurring such expense for the actual amount thereof.** In any case where the Superintendent of Insurance finds it necessary to use the services of anyone other than an officer or regular employee of the Bureau of Insurance to assist in the examination of any Company, Association or Order, either domestic or foreign, each such person so engaged shall be compensated for his services and expenses in the same manner and at the same rate as provided for regular employees of the Bureau." (Emphasis supplied)

It will be noted that when a foreign insurance company is examined by the Superintendent of Insurance or one of his designated agents, the company so examined must pay to the office of the State Treasurer the actual railroad fare involved and in addition the hotel bills and other necessary expenses of the person or persons making such examination. The per diem allowed each individual person making such examination for hotel bills and other necessary expenses is limited, however, to an amount not to exceed eight dollars ($8.00) per day. It will further be noted that the said section expressly provides that the per diem expenses of the person or persons making an examination are payable "upon demand by the Superintendent of Insurance supported by an itemized statement of such expenses, duly sworn to by each such person." The said section makes no provision that vouchers accompany the itemized sworn statement and therefore it is my opinion that the same is not required.

It therefore follows and is my opinion that your first inquiry should be answered in the affirmative.

In answer to your second inquiry I again call attention to Section 8337, as amended, supra, and particularly to that portion thereof that reads as follows:

"* * * All sums paid by such foreign company on account of such expenses or such per diem to the office of the Superintendent of Insurance shall be covered into the State Treasury, and the State Treasurer,

upon being billed by the Bureau of Insurance of the Department of Commerce **and the filing with the State Treasurer an itemized, verified statement of expense, shall reimburse the persons incurring such expense for the actual amount thereof."** (Emphasis supplied)

This office in an opinion to Hon. B. P. Singleton, State Comptroller, dated April 22, 1939 (Quarterly Reports of Attorney General, Vol. XV, page 53), held that regardless of whether an expense account of a State employee has been approved by said employee's Department Head, the Comptroller is not authorized to issue a warrant for the same unless the claim is itemized, verified by affidavit and **has vouchers** therefor attached. This opinion, however, was construing the general provisions of law dealing with this subject and is not in my opinion controlling in this particular instance. Attention is called to the fact that Section 8337, as amended, supra, makes express provision for the per diem allowance of a person or persons for the necessary expenses incurred while engaged in the examination of a foreign insurance company and also details the exact procedure to be followed in reimbursing such person or persons for the expenses incurred. As will be noted, such expenses are payable by the State Treasurer "upon being billed by the Bureau of Insurance of the Department of Commerce and the **filing with the State Treasurer of an itemized, verified statement of expenses."** Said section does not require that vouchers accompany the itemized, verified statement, and, therefore, in view of the general rule of construction that special provisions relating to specific subjects control general provisions relating to general subjects, it is my opinion that your second inquiry should be answered in the affirmative. **Herring et al v. Griffin et al,** 211 Ala. 225, 100 So. 202; **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159; **Pepper v. Horn,** 197 Ala. 395, 73 So. 46.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1941.

Hon. W. L. Borders, Sheriff,
Calhoun County,
Anniston, Alabama.

Gambling Devices—Baseball Machine—

Under facts stated, Baseball Machine held not illegal under the Anti-Gambling Device Act of 1931 (Act No. 671, H. 423, approved July 25, 1931, General Acts, 1931, page 806), or under Section 4235, et seq., of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of February 13, 1941, is as follows:

"I would like to have your opinion as to whether the operation of the following machine, mechanical device or contrivance in Calhoun County, Alabama, violates section 4235, et seq., of the Code of Alabama of 1923.

"The machine is known as a Baseball Machine, and is operated by striking small propelled balls with a bat or paddle, which is controlled by the player by a lever on the outside of the machine. The baseball field is completely flat with small holes in it. There are no springs, pins, lights or bumpers of any sort around these holes or anywhere else on the machine. The machine contains no device for altering the grade of the baseball field, nor does it contain any device for varying the speed of the balls so propelled. The machine has no pay-off device, and is not so built that it can have one. There is no way to adjust the machine so that it will pay off anything of value. There is no free-play attachment to the machine, and no free plays are given for any score made on the machine. No reward, prize, merchandise or additional plays, or any slugs, or slugs redeemable in merchandise are offered as an inducement for anyone to play said machines. The machine has pasted on it the following:

"THIS MACHINE IS OPERATED FOR AMUSEMENT ONLY. THE ONLY THING YOU CAN GET IN PLACING A COIN IN THE SLOT IS THE RIGHT TO PLAY ONE GAME ON THE MACHINE, AND NO REWARD, ARTICLES OR MONETARY VALUE OF ANY KIND WILL BE PAID TO YOU, EXCEPT THE USE OF THE MACHINE WHILE YOU PLAY.

"The charge for playing the machine is five cents per game, and the five cents is deposited in a slot on the side of the machine."

While you inquire regarding the legality of the above described machine under Sections 4235, et seq., of the Code of Alabama, 1923, I presume that you also desire information regarding its legality under Act No. 671, H. 423, approved July 25, 1931 (General Acts, 1931, page 806), the so-called Anti-Gambling Device Act, and my remarks will be directed as well to this later act.

It is my opinion that the machine which you describe in your letter of inquiry is not prohibited by either the Code sections or the act above referred to.

The 1931 act, supra, in defining the outlawed class, by Sub-division (d), Section 1, provides that "any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated **or can be operated as a game of chance,"** is illegal.

This statute has been construed in several instances by the Appellate Courts of this State:

Howle v. City of Birmingham, 229 Ala. 666, 159 So. 206;

One Penny Marble Machine v. State, 233 Ala. 678, 173 So. 91;

Kropp v. City of Tuscaloosa, 197 So. 91.

None of the foregoing cases, however, appear to be applicable to the machine described in your letter of inquiry.

In the Howle case, supra, the Court considered certain "Pin Ball Machines," holding them to be "games of chance" for the reason that they could be so adjusted as to offset the touch of trained or experienced players. It will be noted, however, that the Court there recognized the distinction under the Act between a "game of chance" and a "game of skill."

The machine considered in the **One Penny Marble Machine** case, supra, was also a "Pin Ball Machine". The Court there found that the facts in the agreed stipulation presented to the Court "failed to show it (the device in question) was then being operated as a game of chance, but it was open to the trial court to find that it could be so operated."

It is to be noted, however, that the machine there considered had pins, bumpers or springs upon its surface which tended to destroy the skill of the operator in its ultimate effect.

The Kropp case, supra, considered a "Western Baseball DeLux Machine," which was "so built that it can be adjusted—in its present condition, so that it could have a pay-off device." The Court also noted that the feet or corners on which the machine sat could be so adjusted as to change the operation of the machine.

The machine described in your letter of inquiry appears rather to be of the type held legal in **Town of Centerville v. Burns,** 126 S. W. 2d. 322 (Tenn.), wherein the Court holds that the machine is not a gambling device, for the machine itself yielded nothing "but whatever pleasure the player gets from watching the movements of the ball," it being there stated that "the element of chance essential to gambling is wanting so far as the device is concerned." **Cf. Commonwealth v. Plissner,** (Mass.) 4 N. E. 2d. 241, 245; **Silfen v. City of Chicago** (Ill.), 19 N. E. 2d. 640.

The foregoing conclusion is not in conflict with the opinion found in Quarterly Reports of Attorney General, Vol. XIV, page 160. The machine there considered was a "Pin Ball Machine," rather than a machine containing no pins, bumpers, arches or other devices calculated to deflect the ball once it had started upon its course.

You are cautioned, however, that the conclusion hereinabove stated is applicable only to the machine described in your letter of inquiry. This opinion is not intended to apply to a machine or device which differs in anv respect from that which you describe.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1941.

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Homestead Exemptions—

1. Upon redemption one is entitled to credit for Homestead Exemptions regularly asserted while owner of property.

2. Upon redemption one is not entitled to credit for Homestead Exemption for years when title to the property is in the State.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated February 13, 1941, follows:

"I shall appreciate it very much if you will give me an opinion concerning homestead exemptions for a certain taxpayer in this county to whom I shall refer hereinafter as Mr. A. The facts which raise the question are as follows:

"On October 1, 1936, Mr. A. owned and lived on a farm of 160 acres, same being his homestead. He has continuously lived on and operated this farm and still maintains this property as his homestead at the present time.

"Mr. A. assessed this 160 acres of land for the tax year 1937 on or before the third Monday in January, 1937, at $2,000.00 taxable value, but did not assert a claim for homestead exemption at the time in which the assessment was filed with the Tax Assessor due to the absence of the Homestead Act, which was approved February 20, 1937. After the Homestead Act was passed, Mr. A. was permitted to file a claim for a homestead exemption for the tax year of 1937 on prescribed forms furnished

by the Tax Assessor and was issued a certificate of credit for the amount of State taxes on the $2,000.00 assessed value to be applied as part payment on his taxes due to the Assessor having charged the Tax Collector with the entire amount of taxes, including the taxes on the homestead exemption.

"On October 1, 1937, Mr. A. made his tax assessment for the tax year of 1938, setting out separately in the assessment and designating the particular 160 acres of land with improvements thereon as being his homestead, which was in compliance with the requirements to constitute a legal homestead claim.

"Mr. A. defaulted in the payment of the taxes for the tax year of 1937, which became due on October 1, 1937, and delinquent after December 31, 1937, and same was properly advertised and sold during the month of June, 1938, and bid in for the State, including the State taxes on the $2,000.00 assessed value set out as homestead exemption for the tax year of 1937.

"There is no record indicating that this property has been assessed for taxation by Mr. A. or anyone else for the tax years 1939-1941, inclusive, as the title to this property passed to the State of Alabama on the confirmation of the tax sale for the tax year of 1937.

"Mr. A. now wishes to redeem his 160 acres which sold to the State during the month of June, 1938, for the tax year 1937, and insists that he should be allowed his homestead exemption for state taxes on the $2,000.00 valuation certified to the Probate Judge by the Tax Assessor and will be used by the Probate Judge for the calculation of taxes for the redemption of this property including the tax years 1937-41.

"Mr. A's contention is that a legal claim was asserted by him for the homestead exemption for the tax year 1937 and for the tax year 1938, and being deprived of filing a claim for the subsequent years 1939-1941, as the title to this property was vested in the State of Alabama.

"I shall appreciate a ruling of your office at the earliest date which is convenient for you to do so, stating the exemption for homestead that should be allowed Mr. A. in redeeming this property from the State of Alabama for the tax years 1937-1941, inclusive.

"In an opinion rendered in Biennial Report of the Attorney General 1936-1938, page 609, it was held that Mr. A. would be entitled to the homestead exemption for the tax year 1937. Therefore, please give me your official opinion as to the following:

"(1) Is Mr. A. entitled to a homestead exemption which was asserted by him for the tax year 1937 and permitted to be sold to the State?

"(2) Is Mr. A. entitled to a homestead exemption which was asserted by him for the tax year 1938 prior to the land sale to the State for the tax year 1937?

"(3) Should Mr. A. be allowed a credit for homestead exemption for the subsequent years of 1939-41 inclusive, at the time this property will be redeemed from the State? (However, this property was not assessed by the taxpayer for the years 1939-1941.)"

In answer to your several inquiries, I first call attention to an opinion of this office to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, dated September 22, 1937. (Quarterly Reports of Attorney General, Vol. VIII, page 284), wherein it was held:

"In my opinion, since the lawful right of possession is vested in the purchaser at the tax sale, either the state or other party, the former owner can no longer claim to have such a title and the occupancy as would support a claim of homestead exemptions. In my opinion, therefore, in all applications to redeem property from a tax sale, there must be collected the amount specified by the Revenue Code without allowing any credit for a claim of homestead tax exemption in the former owner of said homestead."

Next I call attention to an opinion of this office to Hon. J. W. Hamilton, Tax Collector, Jefferson County, Birmingham, Alabama, dated December 1, 1937 (Quarterly Reports of Attorney General, Vol. IX, page 127). In this opinion it was held that where a taxpayer was rightfully in possession of property on October 1, 1936, he had a valid claim for homestead exemption from 1937 taxes and his right of exemption would not be affected by a sale of the property to the State in September, 1937, for 1936 taxes. The basis for this holding was that the taxpayer was rightfully in possession of the property on October 1, 1936, and at that time the State of Alabama had no right therein other than its tax lien for 1936 taxes. (See also Quarterly Reports of Attorney General, Vol. VIII, pp. 66, 267.)

It has also been held by this office that where property is exempt as a homestead from 1937 taxes and is sold for 1936 taxes, the Judge of Probate should, upon redemption of said property, list only the actual taxes due, i. e. the total amount minus the exemption allowed.—Biennial Reports of Attorney General, 1936-38, page 609.

From the facts stated in your letter, Mr. A. owned and occupied the property in question on October 1, 1936, and on October 1, 1937. Further, he regularly asserted his claim for homestead exemption for the taxes due October 1, 1937, and also regularly asserted his claim for homestead exemption for the taxes due October 1, 1938, prior to the sale of the land to the State in June, 1938, for taxes due October 1, 1937. It is, therefore, my judgment, based upon the opinion to Hon. J. W. Hamilton, supra, that Mr. A. has a valid claim for homestead exemptions from taxes due October 1, 1937 and 1938. This being true, the Judge of Probate should, upon redemption of the property by Mr. A., list only the actual taxes due; i. e., the total amount minus the homestead exemptions allowed for the taxes due October 1, 1937, and October 1, 1938.—Biennial Report of Attorney General, 1936-38, supra.

Your questions numbered one and two are therefore answered in the affirmative.

In my opinion your question numbered three should be answered in the negative.

During the years 1939-41, both the title and the right of possession of the property formerly owned by Mr. A. was in the State of Alabama, and, therefore, in view of the holding in the opinion to Hon. W. E. Butler, supra, it is my opinion that a credit for homestead exemptions for these years cannot be allowed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 7, 1941.

Dr. Douglas L. Cannon,
Assistant in Administration,
State Department of Public Health,
Montgomery, Alabama.

County Commissioner—Rabies Inspector—

A person may not be a member of the court of county commissioners and hold the office of rabies inspector at one and the same time.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your letter of February 15, 1941, in which you request an official opinion, is as follows:

"Please give me your opinion on the following matter: May a member of a Court of County Commissioners hold office also as Rabies Inspector of the County? In connection with the subject I respectfully refer you to Act No. 200 to be found on page 230 of General and Local Acts, Extra-Session, 1936-1937, As Amended by the Legislature of 1939 (General Acts, Regular Session and Special Session, 1939, page 329)."

Act No. 184, S. 92, approved March 17, 1939 (General Acts, 1939, page 329) is a complete rewrite of the Rabies Act of 1936-1937. The whole field of rabies control is covered in Act No. 184.

I am of the opinion that your inquiry should be answered in the negative.

In an opinion to Hon. J. V. Hughes, Tax Collector, Lawrence County, under date of August 1, 1940 (Quarterly Report of Attorney General, Volume XX, page 139), it was held that a rabies inspector holds an office.

Section 6750 of the Code of Alabama, 1923, prohibits a county commissioner from holding any other office.

The premises considered, I am of the opinion that a member of the court of county commissioners cannot at the same time hold the office of rabies inspector.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 7, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
THE CAPITOL.

1. The Inferior Court of Huntsville created by Local Acts of 1911, page 215, and as amended, is not a court of record.

2. Section 7244, Code of Alabama, 1928 (Michie) does not apply to the Inferior Court of Huntsville as its application is limited only to courts of record.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 24, 1940, in which you request my official opinion as follows:

"Please refer to Act No. 213, page 215, Local Acts of 1911, an amendment thereto by Act No. 77, page 19 Local Acts of 1931 and advise me in answer to the following questions:

"1. Is the Inferior Court of Huntsville a Court of Record?

"2. Should the Clerk of the Inferior Court of Huntsville cover into the County Treasury unclaimed witness fees in his hands two or more years?"

The Inferior Court of Huntsville was established by Local Act No. 213, S. 434, approved April 14, 1911, Local Acts, 1911, page 215. This act has several

times been amended, but these amendments do not affect the question here involved, except as noted below. The jurisdiction of said court is set out in Section 2 of said act, as originally enacted; also in Section 3, as amended by Act No. 104, S. 108, approved July 27, 1923, Local Acts, 1923, page 32. These sections are as follows:

"Section 2. Said court and the judge thereof shall have and exercise all the jurisdiction, power and authority, and shall perform all the duties that are now or may hereafter be conferred by law on justices of the peace in civil and criminal cases, and such preliminary jurisdiction as is now or may hereafter be conferred by law on justices of the peace.

"Section 3. In addition to the jurisdiction above conferred, said Court and the Judge thereof shall have and exercise civil jurisdiction of Justices of the Peace, in all cases where the cause of action arose, or the defendants reside in Madison County, and criminal jurisdiction of Justices of the Peace, in all cases where the offense is committed in Madison County."

There is no clause or section either in the original bill creating this court or the amendments thereto which makes this court a court of record.

It is held by our Supreme Court in the case of **Willett v. Weaver, Treasurer,** 205 Ala. 268, 87 So. 601, that a justice court is not a court of record. **Cook v. Burke, Judge,** 177 Ala. 155, 58 So. 984.

Section 4 of said Act sets out the rules, practice and procedure of said court and is as follows:

"Section 4. Said court shall conform to and be governed by the rules of practice and procedure that are now or may hereafter be made applicable to justices of the peace of this State."

It appears from the above that the Inferior Court of Huntsville so far as jurisdiction, rules, and regulations are concerned, is nothing more than a justice of the peace court. Therefore, it follows that if a justice court is not a court of record, then the Inferior Court of Huntsville here under consideration, is not such a court. See authorities cited above. Quarterly Report of Attorney General, Volume III, page 15. Also compare **Willett v. Weaver, Treasurer,** supra.

Your second question is:

"Should the Clerk of the Inferior Court of Huntsville cover into the County Treasury unclaimed witness fees in his hands two or more years?"

I take it for granted you have reference to the provisions found in Section 7244, Code of Alabama, 1928 (Michie) which is as follows:

"Section 7244. **Report filed with county treasurer.**—On the first day of January in each year, all clerks of courts of record within this state shall file with the county treasurer or custodian of county funds a full and complete report of all witness fees colleceted by them or received by them from their predecessors in office which have not been disbursed to the persons legally entitled thereto, and shall pay into the county treasury all such witness fees which have been collected by them or their predecessors more than two years preceding the making of said report. Said report shall show the amount and date of collection, the name of the witness for whom collected, and the court, style of the cause, and date of its final termination, in which said fee was collected."

You will note this section applies only to courts of record and no others. This being true, and having held above that the Inferior Court of Huntsville is not a court of record, my answer to this question is in the negative. See **Sanders v. Young, etc.,** 220 Ala. 95, 124 So. 225.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. L. H. Montgomery,
Judge of Probate,
Greene County,
Eutaw, Alabama.

Counties—County Governing Bodies—Municipal Street Improvements—

County governing body not authorized to contribute to the cost of municipal street improvements in the absence of any showing that said improvements will be of value or benefit, or serve to beautify, any county property.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of March 4, 1941, in which you request my official opinion as follows:

"Does the Commissioners Court have the authority to appropriate county funds for the improvements of the streets of an incorporated town where the streets to be improved do not touch County property?"

As pointed out in opinions of this office, counties may legally contribute to the cost of municipal public improvements, to the extent such improvements are of value or benefit to county property and to that extent only, but are not subject to assessment therefor (Quarterly Reports of Attorney General, Vol. XIV, page 19; Vol. XIX, page 229).

These opinions were with reference to contributions by the County Board of Education for sewerage, but the same principle necessarily applies to contributions by the county governing body to public municipal improvements, provided such improvements are of value or benefit, or serve even to beautify, county property such as the courthouse. **Town of Eutaw v. Coleman,** 189 Ala. 164, 66 So. 464.

From your inquiry it does not appear that street improvements referred to will be of any value or benefit, or serve to beautify any county property, inasmuch as no county property abuts on the streets to be improved.

I am of the opinion, therefore, that any contribution of county funds under such circumstances is unauthorized by law and would be an illegal diversion of such funds.

It may be said in conclusion that if the county governing body desires to improve or beautify county property, the appropriate procedure is to enter into a contract to that end. In any event, there should be sound basis for the opinion that such improvement will be of real, substantial and direct value or benefit to county property.

Biennial Report of Attorney General, 1928-1930, pages 138, 162, 1011.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. E. M. Boyles, Sheriff,
Marshall County,
Guntersville, Alabama.

Bailiffs—Counties—

In view of particular facts, the payment for services of bailiff appointed by presiding judge of circuit in excess of four for jury session of court, held authorized by Section 186, Code of Alabama, 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 5, 1941, in which you request my official opinion as follows:

"At a recent session of the Circuit Court at Albertville during the criminal week, the Judge of the Ninth Judicial Circuit made an order certifying that it was necessary for me to have four (4) regular bailiffs, who were appointed by me to serve.

"We had a case involving the rape of a child set for trial, which consumed about four (4) days. I was directed by the Judge to appoint an additional bailiff, due to the state of feeling existing against the defendant, and the Judge made a certificate, certifying that on account of the ill feeling in the case of the State v. Wallace Suttle that it was necessary for me to have one extra bailiff in addition to the other four (4) regular bailiffs during the trial of this case, and that Mr. E. A. McGee served four (4) days as such extra bailiff, and that he was entitled to $12.00.

"I placed this man on at the request of the Judge, and was informed by the Judge that he would give the certificate for Mr. McGee. Judge then gave the certificate, but the Probate Judge declines to issue a warrant on the County depository to pay Mr. McGee for the four (4) days service, pending an opinion from the Attorney General, as to its legality. I, therefore, want to know:

"(1) When I am directed by the Judge of the trial court for the protection and safety of prisoners, as was the case here, if I can place on such extra Deputy, where I was directed to do so, and if that Deputy is entitled to be paid from the County Treasury for his services the same as the regular Deputies, for that week of that term of Court. In other words, I want to know if Mr. McGee can be legally paid his services from the County Treasury to the amount of $12.00 for the four (4) days service under such conditions."

In reply, I wish to advise that your question must be answered conditionally. The authority to appoint bailiffs is reposed in the presiding Judge of the Circuit. (Biennial Report of Attorney General, 1934-36, at page 370) **Ward v. State,** 17 Ala. App, 170, 82 So. 660.

Section 6716 of the Code of 1923 provides as follows:

"6716. **Bailiffs, constables, or deputies to attend court.**—The sheriff of the county must summon one person to serve as bailiff for the grand jury; one to serve as bailiff in every circuit court, or division thereof, in which cases are being tried without juries when directed by the judge; and not exceeding four to serve in every court, or division, in which cases are being tried by juries, when the judge thereof certified that such bailiff or bailiffs are actually necessary."

You will note that only four bailiffs may be appointed by the presiding circuit judge, and summoned by the sheriff to serve at the sessions of circuit court or a division thereof, when cases are being tried by juries.

No authority of law exists for the appointment of more than four bailiffs for the jury sessions of a division of the circuit court at one time. (Biennial Report of the Attorney General, 1928-30, page 282).

However, in view of the unusual circumstances of the particular case under consideration, it is my opinion that the county governing body is authorized if it so desires, to pay for the services of the extra bailiff under Section 186 of the Code of 1923, which provides as follows:

> "186. **Equitable claims or demands against county; mode of payment provided.** The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes; First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

The county received the benefit of the services and may pay a reasonable charge therefor. See Quarterly Report of the Attorney General, Volume XV, page 113, and authorities cited therein.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. R. F. Lyon,
County Treasurer,
Shelby County,
Columbiana, Alabama.

Witness Fees—Fine and Forfeiture Fund—Unregistered Claims presumed paid after twenty years.

Witness claims and Officers' claims which are payable from the Fine and Forfeiture Fund under the general laws of Alabama are presumed to have been paid twenty years after their issuance unless same are registered.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of January 7, 1941, is as follows:

"Will you kindly advise me officially whether or not there is a 'time limit' for registering Witness Claims and Officers' Claims for payment from the Fine and Forfeiture Fund'.

"I am cognizant of the fact that your office has ruled that there is no time limit for payment of these claims, once they have been properly Registered by the County Treasurer. However, I am in doubt as to whether or not such claims can be legally registered after the time limit of three years has lapsed for payment of 'Witness Fees' not chargeable against the Fine and Forfeiture Fund. An early reply will be appreciated."

As stated in your letter, the time limit for payment of witness fees that are paid through the Clerk of the Circuit Court is three years, as provided by Section 7245 of the Code of Alabama, 1923, as amended by Act No. 33, S. 59, approved February 16, 1939 (General Acts, 1939, page 34). However, Section 7245, as amended supra, is applicable only to those fees which pass through the Clerk's hands, and is not applicable to the witness fees payable from the Fine and Forfeiture Fund of the county. Opinion to Mr. H. C. Landman, Cashier, First National Bank, Huntsville, Alabama, rendered under date of August 19, 1939 (Quarterly Report of Attorney General, Vol. XVI, page 172).

You are also correct in your statement that after claims against the Fine and Forfeiture Fund have been registered they are never barred. Opinion to Hon. H. W. McKenzie, Treasurer, Marion County, rendered under date of January 19, 1939 (Quarterly Report of Attorney General, Vol. XV, page 302).

The specific question proposed by your inquiry is "whether or not there is a 'time limit' for registering Witness Claims and Officers' Claims for payment from the Fine and Forfeiture Fund."

This office has heretofore held in an opinion to Hon. Travis Johnson, Treasurer, Walker County, rendered under date of May 30, 1938 (Quarterly Report of Attorney General, Vol. XI, page 55), that witness certificates over twenty years old that have not been registered are conclusively presumed to be paid and are not subject to registration. The holding in this opinion was based upon the cases of **Henry v. State,** 16 Ala. App. 670, 81 So. 190; **Semple v. Glenn,** 91 Ala. 245, 6 So. 46; **Roach v. Cox,** 160 Ala. 425, 49 So. 578.

This theory of prescription is ably explained by Mr. Justice Foster in **Wilkerson v. Wilkerson,** 230 Ala. 567, 161 So. 820, as follows:

"Since an early period in this state, prescription has been in force, created by the chancery court as a rule of repose, and it is thus stated in McArthur v. Carrie, 32 Ala. 75, 88, 89, 70 Am. Dec. 529, by Stone, J.: 'In this, as in most of the States of this Union, there is a growing disposition to fix a period, beyond which human transactions shall not be open to judicial investigation, even in cases for which no statutory limitation has been provided. * * * By common consent, twenty years have been agreed on, as a time at the end of which many of the most solemn transactions will be presumed to be settled and closed.' And in Garrett v. Garrett, 69 Ala. 429, it is said: 'So sweeping is the principle in its scope and operation, that the presumption raised by it is not arrested or rebutted by the proof of the disability, such as infancy or coverture, on the part of the distributees by whom a trustee or administrator has been cited to settlement.' In Matthews v. McDade, 72 Ala. 377, 388: 'Twenty years is a period of time beyond which the courts are indisposed to permit past human transactions to be disturbed by judicial investigation.' McArthur v. Carrie, supra; Garrett v. Garrett, supra; Baker v. Prewitt, 64 Ala. 551; Street v. Watts, 202 Ala. 622, 81 So. 564; Long v. Parmer, 81 Ala. 384, 1 So. 900; Bozeman v. Bozeman, 82 Ala. 389, 2 So. 732; Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Alabama C. & C. Co. v. Gulf C. & C. Co., 171 Ala. 544, 54 So. 685; Scott v. Scott, 202 Ala. 244, 80 So. 82. Again it is said in Snodgrass v. Snodgrass, 176 Ala. 276, 280, 58 So. 201, 202, that 'the consensus of opinion in the present day is that such presumption is conclusive' and quoting from an earlier case, 'the presumption rests not only on the want of diligence in asserting rights, but on the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which, it has been said, have often more of cruelty than of justice in them, that it conduces to peace of society and the happiness of families, "and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible."' Harrison v. Heflin, 54 Ala. 552, 563, 564; Greenless v. Greenless, 62 Ala. 330; Semple v. Glenn, 91 Ala. 245, 260, 261, 6 So. 46; 9 So. 265, 24 Am. St. Rep. 894; Roach v. Cox, 160 Ala. 425, 49 So. 578, 135 Am. St. Rep. 107.

"The rule now creates a conclusive bar, Roach v. Cox, supra; Oxford v. Estes, 229 Ala. 606, 158 So. 534, and is not affected by the circumstances of the situation, that is to say, whether truth and justice are thereby obscured, or by the death of parties or destruction of testimony, and conduct based upon the apparent situation, or the age, state of mind, or status of responsibility. These are circumstances which are considered in respect to laches but not prescription. Oxford v. Estes, supra; Courson v. Tollison, 226 Ala. 530, 147 So. 635; Ashurst v. Peck, 101 Ala. 499, 14 So. 541.

"But such circumstances only give a reason for the adoption of the twenty-year period of prescription, and are not necessary to exist that its operation shall be complete. McCartney v. Bone, 40 Ala. 533; Patterson v. Weaver, 216 Ala. 686, 114 So. 301; Ashurst v. Peck, 101 Ala. 499, page

509, 14 So. 541; 21 Corpus Juris 212. It is not dependent upon statute, though it is there recognized. Section 8960, Code."

It is my opinion that witness claims and officers claims against the Fine and Forfeiture Fund are subject to registration at any time within twenty years from the date of issuance unless regulated by some local act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. Joel S. Sanders,
Superintendent of Education,
Pike County,
Troy, Alabama.

Schools—County Board of Education of Pike County may legally pay from school funds the cost of transportation of commodities furnished by the Work Projects Administration of the United States Government from Montgomery to Troy to be used at school houses in furnishing lunches to destitute school children.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of February 27, 1941, in which you request my official opinion as follows:

"The Works Progress Administration of the United States Government ships commodities from Montgomery, Alabama to Troy, Alabama to be used for school lunches in many of the schools of Pike County under the jurisdiction of the County Board of Education.

"Can the County Board of Education of Pike County legally pay from public school funds of Pike County the cost of transportation of said commodities from Montgomery to Troy?"

In answering your question, I am assuming that the commodities furnished by the Work Projects Administration are used in providing lunches at school houses for destitute school children.

In my opinion your question should be answered in the affirmative.

This office, in an opinion to Dr. A. M. Collins, Superintendent of Education, Montgomery, Alabama, under date of September 9, 1938 (Biennial

Report of Attorney General, 1936-38, page 783) held that a County Board of Education is authorized to make appropriation to county health departments to be used for public health services connected with school system from funds not specifically covered by Subsection 3 of Section 2 of the Minimum Program Act.

I wish to quote from this opinion as follows:

"The question now arises as to whether or not an appropriation to the County Health Department for the exclusive use and benefit of the schools by the County Board of Education for public health services is an appropriation for 'public school purposes.' By Sections 8, 86 and 98 of the School Code of Alabama, educational matters effecting the county school system and the general administration and supervision of the public schools and of the educational interests of each county, are vested in and are under the control of the County Board of Education. The purpose of the entire educational system is to maintain efficient free public schools within the State of Alabama and within each county. As will be shown, the protection and promotion of the health of the school children is a necessary adjunct to this expressed purpose and in my judgment the county boards of education by implication possess the power to make such appropriation as are required to accomplish that purpose. To paraphrase the statement in **State v. Brown,** 128 N. W. 294, education of a child means much more than merely communicating to it the contents of text books, but even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study of which each child is capable. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. In line with these principles there has been established in the Department of Education a division of physical health education (Section 20 of the School Code, 1927), and Article XL (Sections 619-625) of the School Code of 1927 provides for the cooperation of county boards of education with county boards of health in the promotion of a physical program for the school children of the county.

"The provision contained in the school code for the physical welfare of the children is peculiarly efficacious, for as a general rule, the immaturity of children renders their mental efforts largely dependent upon physical conditions."

In my opinion contributing the cost of transportation of the commodities used in furnishing lunches to destitute school children is really contributing school funds to the health and physical education of the destitute school children which is an important part of their education.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. Albert W. Gill, Director,
State Department of Conservation,
Montgomery, Alabama.

Costs and fees—Courts—Justices of the Peace—

Justice of the peace courts or county courts have no authority to accept payment of fine and costs in installments.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of February 13, 1941, in which you request my opinion, is as follows:

"Re: Request for official opinion regarding powers of Justices of the Peace.

"We have received numerous inquiries throughout the State from Justices of the Peace, Judges of the county courts, and game wardens regarding the power of a Justice of Peace to allow a convicted violator of the game laws to pay his fine and court costs on the installment plan.

"On numerous occasions the Justice will enter on his docket a conviction and assess a fine together with costs of court, and on said occasions he has allowed the defendant to pay part of said fine and costs, which payment will be entered on the warrant showing the balance due and the date the balance is to be paid. Is such procedure legal?

"I also request your opinion as to whether or not a Justice of Peace, after hearing a case involving a violation of one of the game laws or regulations, can legally mark the case continued on his docket and allow said defendant to pay on the installment plan by the week or month and upon each payment mark the case continued until such fine and costs have been paid."

I am of the opinion that both of the methods of procedure outlined in your inquiry are improper and are not permitted under the laws of this state.

The general rule is that when a defendant is convicted and a fine and costs assessed against him, he can either presently pay the fine and costs or the court may allow him to confess judgment with good and sufficient sureties for fine and costs. Upon the failure to pay the fine and costs or confess judgment therefor, the defendant should either be put in the county jail or in the discretion of the court, sentenced to hard labor for the county. Sections 5290 and 5291, Code of Alabama, 1923; Quarterly Report of the Attorney General, Volume XIV, page 194; Quarterly Report of the Attorney General,

Volume XV, page 50. However, the above is limited in its application in certain courts by Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), providing for a system of probation and suspension of sentence in criminal cases. Said act authorizes courts from which an appeal lies directly to the Supreme Court or Court of Appeals of this State to grant probation and suspension of sentences. It has no application in the instant situations, as the courts under consideration are justice of the peace courts and county courts from which an appeal does not lie directly to the Supreme Court or Court of Appeals, and the cases are not ones in which the benefits of probation are requested under Section 2 of said act.

I wish to call your attention to the fact that justices of the peace cannot sentence a defendant to hard labor for the nonpayment of costs. Section 3849, Code of Alabama, 1923. In a justice of the peace court, if costs are not paid or judgment confessed therefor, same can only be collected by proper execution against the defendant.

A case may be continued from time to time in the discretion of the court, but any alleged payment by a defendant toward the payment of a prospective fine and costs is not, in my opinion, a legal payment of said fine and costs to the Court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 8, 1941.

Hon. J. A. Johnson,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Motor Vehicles—Licenses—

A motor vehicle used upon the highways of the State as a "wrecker" is subject to the license imposed by Schedule 158 et seq. of the 1935 Revenue Act, as amended (Act No. 194, H. 324 approved July 10, 1935, General Acts, 1935, page 256).

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, dated February 15, 1941, is as follows:

"I wish you would give me an opinion as to whether or not a 'Motor Truck', used by the local Auto repair shops, and operators of Garage

men, to haul in wrecked cars to repair them at their own place of business, are subject to license or are required to purchase a Tag for the same.

"The trucks have a crane attached to them permanently, and are not used to haul passengers, freight or merchandise.

"Some two or three men have been cited this week by the License Inspector to purchase tags for the same; but they were under the impression that they did not have to purchase tags for the 'Motor Trucks'.

"Wish you would write me if the Opinion given by Hon. A. A. Carmichael, Attorney General, on October 20, 1936, on this subject has been changed, or shall we follow that opinion."

The opinion rendered to Hon. Henry S. Long, State Tax Commissioner, under date of October 20, 1936, to which you refer in your letter, which opinion appears on page 40, Vol. V, Quarterly Report of Attorney General, did not deal with motor units commonly referred to as "wreckers".

I deem it advisable, before proceeding to an answer of your question, to distinguish the facts presented in your request from the facts presented in the opinion rendered to Mr. Long.

In the Long opinion it appeared that the "unit" there considered did not customarily operate on the public highways of the State, and, in fact, it was not used as a "motor vehicle" within the commonly accepted meaning of the term. It was stated in the Long opinion that under the facts presented, the mechanized unit there considered was not a "motor truck" within the meaning of sub-section (j) of Schedule 158 of the Revenue Act of 1935. It is true that both the mechanized unit here considered and the mechanized unit considered in the Long opinion had a crane attached thereto. However, in the Long opinion the unit was not in constant use on the highways of the State. On the contrary, the unit there considered was used on private property, and, in fact, it was not used as a "motor vehicle," but was used as a more or less stationary derrick. Under the facts presented in your request, the unit is used upon the highways of the State as a "motor vehicle," and, in my opinion, would not come within the purview of the Long opinion.

In my opinion there can be no steadfast rule laid down to cover all classes of wreckers. Schedule 158 of the Revenue Act of 1935 includes within its purview all motor vehicles which are used upon the public highways of the State. Each of the subdivisions of Schedule 158 are directed to the imposition of a license upon the particular types of motor vehicles described in such sub-division. Included in these types of vehicles upon which a license is imposed are: private cars (Schedule 158.1); jitney buses (Schedule 158.2); motor vehicles used for transportation of passengers for hire (158.3); hearses and ambulances (Schedule 158.4); motor trucks (Schedule 158.5, 158.6, 158.7, 158.8 158.9); motor tractors (Schedule 158.10).

It is a matter of common knowledge that motor vehicles commonly referred to as "wreckers" are used on the public highways. The type of license

tag required for such wreckers will therefore depend upon the particular category of motor vehicles into which each wrecker falls.

Since I have determined that a wrecker is a motor vehicle, it being a "vehicle * * * * which is self-propelled" (Schedule 158(a), and since all motor vehicles must carry some type of license tag, a process of elimination can be resorted to to determine the particular type.

It is clear that a wrecker is not a jitney bus or a motor vehicle used for transporting passengers for hire, or a hearse, or an ambulance, or a motor tractor.

There remains only the category of "motor trucks" and "private cars."

A "motor truck" is defined by sub-section (j) of Schedule 158 as, "Any motor-propelled vehicle designed for carrying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles equipped primarily for passenger transportation."

Under the facts detailed in your letter of inquiry, the wrecker is clearly not designed for carrying freight or merchandise, or drawing a similar truck on not more than two axles and not operated or driven on fixed rails or tracks. Of consequence the wrecker described in your letter of inquiry cannot come within the category described as "motor trucks." The question of whether a wrecker carries a "motor truck" tag depends in great part upon the design of the truck. In short, the question of whether a wrecker is designed for carrying freight or merchandise is one of fact and the law imposes the duty upon you to determine this fact.

Where you find that a wrecker is not so constructed or designed as to come within the definition of a "motor truck" as above set forth, then you should charge the owner of such wrecker with the appropriate license tax for a private car. (See Schedule 158.1). The mere fact that the vehicle is being used for commercial purposes will not, in my opinion, deprive it of its character as a private car.

You will see from the foregoing that some license must be issued for a wrecker in every instance, the license tax depending upon the category within which such wrecker falls.

The opinions appearing on pages 301 and 313 of the Biennial Report of the Attorney General, 1928-1930, are not applicable to the question here presented, as these opinions were dealing with the Revenue Act of 1927. There were no definitions of the various classes of motor vehicles in the 1927 Act and it, therefore, appears that such opinions would not be applicable to the questions here presented.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 10, 1941.

Hon. P. A. McDaniel,
County Superintendent of Schools,
Barbour County,
Clayton, Alabama.

Costs and fees—Sheriffs—Schools.

Sheriff's fee for serving warrants upon persons charged with a violation of compulsory attendance law payable in the same manner and from the same source as in other criminal cases (Sections 305 and 320 of the School Code of 1927; Section 3558, Code of Alabama, 1923).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 5, 1941, in which you request my opinion as follows:

"Is there legal provision for paying the Sheriff of a County for serving warrants upon persons recharged with a violation of the compulsory attendance law?

"If so, is compensation for such services paid from the General Fund of the County?

"If not, does the County Board of Education have authority to pay the Sheriff for such services to the extent of actual expense incurred by his office from the public school fund of the County?"

Article XVI (Sections 301-338) of the School Code of 1927 provides for "school attendance."

Section 305 of said Code deals specifically with the offense of which you inquire and is as follows:

"305. Person Loco Parentis Responsible for Child's Attendance.—Each parent, guardian, or other person having control or charge of any child required to attend school or be regularly instructed by a private tutor, who fails to have such child enrolled in school or who fails to send such child to school or have him instructed by a private tutor during the time such child is required to attend a public school, private school, denominational school, or parochial school, or be instructed by a private tutor, or fails to require such child to regularly attend such school or tutor, or fails to compel such child to properly conduct himself as a pupil, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred ($100.00) dollars, and may also be sen-

tenced to hard labor for the County for not more than ninety (90) days. The absence of a child without the consent of the principal teacher of the school he attends or should attend, or the tutor who instructs or should instruct such child shall be prima facie evidence of the violation of this section."

Section 320 of said Code provides as follows:

"320. Juvenile Court Jurisdiction.—The Juvenile Court of the County shall have original and exclusive jurisdiction of all prosecution or proceedings arising under the provisions of this article against or concerning any parent, guardian, or other person having charge or control of a child, or against or concerning any child or other person for the purpose of enforcing the provisions of this article and effecting its objects, and all provisions of Article I of Chapter 100 of the Code of Alabama of 1923, which Article I consists of Sections 3528 to 3559, both inclusive, of said Code, shall apply to prosecutions or proceedings arising under the provisions and terms of this article."

It will be seen that under Section 320, supra, the offense provided for in Section 305, supra, is triable in the juvenile courts and all provisions of Article I of Chapter 100 (Sections 3528-3559) of the Code of 1923 are applicable to such prosecutions. Biennial Report of Attorney General, 1928-30, page 118.

This necessitates a consideration of Article I of Chapter 100 of the Code of 1923, and particularly the last sentence of Section 3529, as amended by Acts 1931, page 353, and Section 3558 thereof, which provide as follows:

"Section 3529 * * * * * All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses of maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county and shall be paid by the county treasurer when itemized and sworn to by the creditor or other persons knowing the facts in the case, and approved by the judge."

"Section 3558. Officer serving process, etc., under juvenile courts; costs and fees of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

In considering the above quoted provisions of law, this office has heretofore held that both have a field of operation. Said opinions are to the effect that Section 3529, as amended, supra, applies in cases of juvenile delinquents, and that Section 3558, supra, has application in cases where the defendants are adults. Quarterly Report of Attorney General, Volume XVI,

page 126, and opinions cited therein. Cf. Biennial Report of Attorney General, 1936-38, page 501, and Biennial Report of Attorney General, 1934-36, page 604.

It, therefore, follows that in the instant case Section 3558, supra, is applicable and the fee in question is the same, in respect to amount and manner of payment, as now allowed in the circuit court or courts of like jurisdiction, viz: as in other criminal cases. The same is not payable out of the general fund of the county as Section 3529, as amended, supra, has no application.

The above answers your first two inquiries and obviates the necessity of answering your third inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 10, 1941.

Hon. W. M. Cousins, Jr., Clerk,
Circuit and Inferior Court of Elmore County,
Wetumpka, Alabama.

State witnesses who appear before a committing magistrate on a primary investigation are not entitled to pay for their attendance out of the fine and forfeiture fund where the grand jury fails to indict.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of February 19, 1941, in which you request an official opinion, is as follows:

"I will appreciate your opinion on the following matter:

"When a person waives hearing in the Inferior Court to the Grand Jury and the Grand Jury fails to indict, can the witnesses in the preliminary hearing be paid as if the defendant was convicted or found not guilty? As you know, in the Inferior Court when a defendant is found not guilty the witness certificates are marked 'State fails to convict', and the witness is paid out of the fine and forfeiture fund. In a case like this what notation would be put on the witness certificate?"

Proper consideration of your inquiry must be predicated on the fact that the Judge of the Inferior Court of Elmore County on preliminary hearing

does not sit as Judge of the Inferior Court, but as a magistrate. See Sections 5225-5248, Preliminary Examination and Its Incidents, 1923 Code of Alabama.

The Judge of the Inferior Court of Elmore County has preliminary jurisdiction. See Sections 2 of Act No. 90, H. 387, approved May 29, 1935 (Local Acts, 1935, page 24).

A witness, appearing for the State in a preliminary investigation or hearing where the defendant waives such preliminary investigation and is bound over to await the action of the Grand Jury, cannot be paid for his attendance at such preliminary hearing or investigation out of the Fine & Forfeiture Fund of the county. **Bilbro v. Drakeford,** 78 Ala. 318.

The law of costs is a penal one, and must be strictly construed. The Fine & Forfeiture Fund of the various counties of the State are of statutory creation, and unless some specific authority can be pointed to in the statute, no payments can be made out of such Fine & Forfeiture Fund. There is no provision of law for the payment of such witnesses out of the Fine & Forfeiture Fund.

Since it is my opinion that these witness fees cannot be paid, there is no necessity for making any endorsement on these witness certificates.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 12, 1941.

Hon. F. R. Albritton,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Counties—Wilcox County—

1. Under Act No. 436 (Local Acts, 1939, p. 266) any county official or employee may sign a requisition for an kind of supplies needed for his office or department.

2. Under said Local Act the court of county commissioners does not have the authority to delegate to any **one** county employee the power to sign **all** requisitions.

3. Under said Local Act the Judge of Probate must approve and sign all requisitions, but may authorize his assistant clerk to sign his name to purchase orders.

4. Under said Local Act the Judge of Probate must sign all warrants unless he is absent from the county or sick, and in these events the county commissioners shall designate one of their number to sign warrants during such absence or disability.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of February 6, 1941, in which you request my official opinion as follows:

"I would like for you to give me an opinion relative to a number of different questions that have come up in the construction of Act No. 436, Section 11, Page 266 of the Local Acts of 1939:

"1. Is it legal for any county official or employee to sign a requisition if it is properly approved by the Judge of Probate for machinery, tools, office supplies, or supplies of any kind that are necessary for the use of this County?

"2. Is it legal for the Court as defined in this Act to delegate the authority (that is the right to sign a requisition) by a resolution properly spread on the minutes of the court as to any county employee so named in said resolution?

"3. Is it legal for the Judge of Probate to delegate the authority to sign his name to warrants, approval of requisitions and purchase orders to his assistant-clerk of the said Court by a resolution to this effect properly placed on the minutes?"

Before answering your inquiries, which are based solely on Section 11 of your Local Act, (Act No. 436, Local Acts, 1939, p. 266), I desire to call your attention to a fundamental rule of statutory construction to the effect that an Act should be construed as a whole, since each section, paragraph and clause thereof stands in pari materia.

Wages vs. State, 225 Ala. 2, 141 So. 707;

Southern Industrial Institute vs. Lee, 234 Ala. 404, 175 So. 365.

Following this rule of construction, I have given consideration to the entire Act, and my answer to your inquiries will be made from a study of the Act as a whole, rather than upon Section 11 thereof. In addition, it is necessary that some consideration be given to the Uniform System of Accounting and Reporting Act, (Act No. 26, General Acts, 1935, p. 43), which is now being administered under the supervision of the Chief Examiner of Public Accounts, (Sections 5 and 26, Act No. 112, General Acts, 1939, p. 144). Under the requirements of this Act, according to administrative construction, an officer or employee of a county, who is in need of supplies or materials for

his office or department, should sign and turn in to the proper county official a requisition for such supplies or materials. After said requisition has been approved, that is, after the proper officer or official of a county who is given the authority to make purchases for the county has agreed to make such purchase for said officer or employee, a purchase order is issued by him to the person or firm from whom such goods are to be bought. It will be observed that there is a distinct difference between a requisition and a purchase order, and likewise, a great difference in the purposes which they serve. Quarterly Report of Attorney General, Vol. XIII, p. 60. With these thoughts in mind I shall proceed to answer your inquiries in the order in which you list them.

Section 11 of your Local Act, supra, reads as follows:

"Section 11. **Purchases: The court of county Commissioners** of Wilcox County is hereby charged with the duty of **purchasing in the name and for said county,** all road machinery, tools, implements, books, blanks office stationery, office or house furniture, fixtures, articles or other things which may be required by law for the county and which are to be paid for out of any of the funds of the county. The court may at its option by agreement with the State Department of Finance make purchases through that State Department or other state agency authorized by law to handle such purchases and when doing so all such purchases shall be handled in the same manner as purchases which are made for the State of Alabama. In case the Court of County Commissioners elects to make its own purchases it shall do so only after bona fide competitive bids have been submitted. The court shall advertise for said bids at least one time in a newspaper published in the County of Wilcox and shall post notice calling for said bids at least three weeks before the letting of such contracts at the court house of said county and shall mail requests for bids to three or more of the leading firms or persons dealing in such commodities in the general trade territory in which Wilcox County is located in order that due public notice may be given of intention to make said purchases. The **County Road Engineer** and the **Judge of Probate** may purchase material, tools, repairs and supplies in amounts not exceeding $100.00 (One hundred dollars) provided that report of such purchases are **submitted** to the court at the next regular meeting for approval. All persons, firms or corporations from whom purchases of any road machinery, repairs, materials, supplies or equipment and all persons, firms or corporations furnishing material, or doing work on any road or bridge in Wilcox County, shall make out, itemize and swear to all claims for such machinery, repairs. material, supplies, equipment or service which shall be approved by the County Road Engineer and the Judge of Probate, in case of road machinery, repairs, materials, supplies or equipment for roads or bridges and by the Judge of Probate together with the other affected **County official or employee,** in case of other purchases not affecting **roads or bridges.** This approval for claims shall take place before the **court** allows the payment of same. Such payments shall be made direct to such person or persons, firm or corporation doing such work or furnishing or selling such machinery, repairs, material, supplies or equipment. No purchase shall be made except on **requisition signed by the county official or employee and approved by the Judge of Probate.** No purchase above $100.00 (One hundred dollars) shall be made without

order of a majority of the court and no claims of any kind shall be paid without a majority vote of the court. Such orders must appear on the minutes of the court. It shall be unlawful for the Judge of Probate to issue a warrant in payment of any purchase not made in compliance with these provisions." (Emphasis supplied)

I am of the opinion that your first inquiry should be answered in the affirmative. By that I mean that it is permissible under your Local Act, supra, for any county official or employee to sign a requisition for any materials, tools, office supplies, or any other kind of supplies other than for roads and bridges, that are necessary for his office or department, and then have the same **approved** by you, as Judge of Probate. In the case of road machinery, materials, etc. Road Engineer and then approved by you. However, in all other instances the requisition must be signed by affected official or employee.

Section 11, supra, provides that no purchase shall be made except on requisition signed by a county official or employee and **approved** by the Judge of Probate. Said Section further provides that all claims covering the purchase of supplies for the county shall be itemized and sworn to by the seller and also approved by the County Road Engineer and Judge of Probate in those instances in which the purchase was made for the Road Engineer. In all other instances the claims are to be approved by the Judge of Probate and the affected county official or employee.

In answer to your second inquiry. I am of the opinion that the answer to the same lies in what I have heretofore said since every county official or employee has the authority to sign a requisition for supplies for his office or department. From this it would seem that there would be no occasion for designating any particular employee to sign requisitions.

In answering your third inquiry, I think it necessary to consider Sections 4 and 15 of your Local Act, supra, which are as follows:

"Section 4. **Judge of Probate, Clerk, and Assistant Clerks:** The Judge of Probate of Wilcox County as the Chairman of the Court of County Commissioners shall be its presiding officer and shall sign the minutes of the proceedings of the Court; and shall have the rights, powers, authority, privileges, and duties as a member thereof except as hereinafter provided and shall sign all warrants drawn on the County Treasury and all orders drawn for disbursements of the County funds; and shall sign all contracts entered into by the County; and it shall be his duty to prepare the order of business and obtain information for the sessions of the Court and see that all orders thereof are properly executed and in addition thereto he shall perform all duties and have all rights, powers, jurisdiction, and privileges that may now or hereafter be granted to and required of the Judge of Probate as Chairman of the Court of County Commissioners as to matters coming before courts of county commissioners, except as otherwise provided in this act; and he shall exercise such jurisdiction, powers, privileges as are prescribed for the Judge of Probate as Chairman of the Court of County Commissioners under the general laws of the State of Alabama; and he shall also be the Clerk of the said

Court; and under the direction of such Court he shall keep the records and proceedings in well-bound volumes provided for that purpose and said records are to be kept in the office of the Judge of Probate for examination by citizens of the county and other interested parties; and he shall perform such other duties as clerk as are required of him by said court, and whenever in the opinion of the court the business of the county requires it the court may provide **assistant clerks, prescribe said assistant clerks** duties, fix the term of employment and their compensation and may dismiss at will such assistant clerks. Such assistant clerks shall **perform such duties** as shall be required of them in the name of the Judge of Probate as clerk of said court and under the supervision and direction of Judge of Probate as clerk of said Court." (Emphasis supplied)

"Section 15. **Warrants.** The Judge of Probate shall issue and sign all warrants required by law to be issued and signed. In event of the absence of the Judge of Probate from the County or in case of illness rendering him unable to attend to business the court may at a regular meeting designate one of their number to sign said warrants during the absence or disability of the Judge of Probate, said designation to be entered upon the minutes of the court. No warrants shall be issued unless sufficient funds have been provided with which to pay same when presented for payment."

It is observed that Section 4 provides that the Judge of Probate is to be the clerk of said court and that the court may employ assistant clerks, who shall perform such duties as may be required of them in the name of the Judge of Probate as clerk of said court. Such services are to be performed under the supervision and direction of the Judge of Probate, as clerk of the said court.

The case of **Merlette vs. State,** 100 Ala. 42, 14 So. 562, sets forth a clear distinction between a judicial and a ministerial act and holds that power to perform a ministerial act may be delegated to others, but that such power cannot be delegated in the case of judicial acts. From the rule of law promulgated in this case I am of the opinion that the matter of **approving** requisitions is a judicial act and, therefore, the power to perform the same cannot be delegated by you to your assistant clerk, but must be performed by you as Judge of Probate and clerk of said court.

In the case of purchase orders, as I understand the use of them, I am of the opinion that you can authorize your assistant clerk to issue and sign your name to them. In doing this, the assitant clerk is not required to exercise any discretionary power for the reason that purchase orders are only issued after requisitions have been approved and an order made to purchase.

In reference to signing warrants, I am of the opinion that they must be signed by you. Section 15, supra, provides that all warrants shall be signed by you unless you are absent from the county or sick, and in either of these instances the court is to designate one of its members to sign the same. From this section it seems that you, as Judge of Probate, do not have any

authority in reference to authorizing anyone to sign warrants for you. The Act makes it imperative that you sign all warrants unless you are absent from the county or ill, and under these circumstances the Act specifies how they are to be signed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 19, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Alabama Beverage Control Act—

Effect upon manufacturer of change of status of county from "wet" to "dry"—

1. A person duly licensed under the Alabama Beverage Control Act to manufacture vinous and/or malt beverages in a "wet" county in Alabama may not continue to manufacture such beverages in such county should such county change its status from "wet" to "dry."

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of February 15, 1941, is as follows:

"Application and inquiry has been made at this office in reference to certain questions involved in the Alabama Beverage Control Act as passed by the Special Session of the Alabama Legislature 1936-37, House Bill 44, and I would appreciate your answer to the following questions:

"1. If a manufacturer of vinous and/or malt beverages should be operating in a wet county properly licensed by Alabama Beverage Control Board and such county should vote dry after such manufacturer was in business would such manufacturer be allowed to continue to operate and sell to the State Stores in counties where the Alabama Beverage Control Act was in operation.

"2. If a manufacturer of vinous and/or malt beverages was in business in Alabama and properly licensed by the Alabama Beverage Control

Board and all of the Counties of Alabama should vote dry could such manufacturer continue to manufacture such vinous and/or malt beverages and sell the same in other states.

"3. If a manufacturer of vinous beverages and/or malt beverages was located in a wet County and properly licensed by the Alabama Beverage Control Board and such county should later change its status and vote dry could said manufacturer continue to manufacture and sell malt or vinous beverages in counties operating under the Alabama Beverage Control Act and in other states where the sale of such vinous or malt beverages was legal upon compliance with the regulations in said states."

The Alabama Beverage Control Act is Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 (General Acts, 1936-37, page 40). Section 51 thereof contains the local option provisions of the Act. These provisions contain the machinery for the holding of elections from time to time in the various counties of the State upon the question: "Do you favor the legal sale and distribution of alcoholic beverages in this county?" If the majority of the electors of the county voting at an election held on such question vote in the affirmative, then such county is designated as a "wet" county, and if a majority of the electors of the county voting at such election held on such question vote in the negative, then such county is designated as a "dry" county. In a subsequent election held under the provisions of this Section, a county may change its status from "wet" to "dry," or vice versa. This Section contains the following proviso:

"In all dry Counties, as defined in this Section, the Statutes of Alabama prohibiting the manufacture, sale or distribution of Alcoholic Beverages shall remain in full force and effect, and any person, firm, or corporation convicted of violating any of the provisions of the present statutes of Alabama regulating or defining the illegal manufacture, sale or distribution of alcoholic beverages shall be punished as now provided by such laws."

It is to be noted that this proviso only deals with the "manufacture, sale or distribution" of alcoholic beverages in "dry" counties.

In my opinion, the very recent case of **Hall v. State,** 199 So. 744, is conclusive authority for the view that each of the questions propounded by you should be answered in the negative.

The offense for which the defendant in that case was convicted was the offense of violating the prohibition laws of the State, by having whiskey in his possession. According to the agreed statement of facts, the defendant had in his possession in Geneva County, Alabama, on the 20th day of April, 1940, about one-half pint of whiskey in a pint bottle, which had the Alabama State Store stamp thereon, and which the defendant had purchased from the State liquor store at Dothan, Alabama. The balance of the pint of whiskey had been drunk by the defendant himself, and he had not sold the same or offered the same for sale. It was further agreed that a majority of the qualified electors of Geneva County voting in the election held on March 10, 1937, as provided for in Section 51 of the Alabama Beverage Control Act, voted in

favor of the legal sale and distribution of alcoholic beverages in Geneva County, Alabama, and that subsequent thereto the Governor issued his proclamation, as provided in said Act, declaring Geneva County to be one of the "wet" counties in Alabama; and that subsequent to said proclamation State liquor stores were established and opened in Geneva County, under the provisions of the Alabama Beverage Control Act, for several months.

It was also agreed that at an election subsequently held on the 9th day of November, 1937, in Geneva County, as provided by said Act, a majority of the qualified electors voting in said election voted against the legal sale and distribution of alcoholic beverages, and immediately following said election the State Liquor Stores were removed from Geneva County, and all beer licenses were cancelled.

I quote in extenso from the opinion of the Court of Appeals in that case:

"We gather, from the earnest oral argument by counsel for appellant, upon the submission of this case in this court, as well as from extensive briefs filed by him, that one of the principal insistences is to the effect that a different legal status prevails in Geneva County than that existing in other 'dry' counties of the State. In this connection it is urged as a result of the Alabama Alcoholic Beverage Control Board having acquired jurisdiction and authority in Geneva County, only that portion of Section 51 of said Act prohibiting the **manufacture, sale or distribution** of alcoholic beverages shall (be) or remain in full force and effect, and left the possession, transportation and delivery of alcoholic beverages still subject to the control of the Board, under the provisions of sub-section (b) of Section 6 of this Act. Gen. Acts 1936-37, Sp. Sess. pp. 40, 47, 81.

"Further, that the Alabama Beverage Control Board has authority under said Sub-section (b) to prescribe rules of possession, transportation and delivery of alcoholic beverages in Alabama, and certainly in Geneva County, a county that became wet under the provisions of Section 51 of the Act on March 10, 1937, and since the Alabama Alcoholic Beverage Control Board, so far as we know, has not adopted any rules or regulations, and has not made any provisions prohibiting the possession of alcoholic beverages legally purchased from a State Liquor Store in this State, that the possession by appellant in this case of such liquor in Geneva County was not in violation of the law as it obtains in Geneva County.

"In view of the numerous adjudications of this court, and Supreme Court, we perforce must and do hold the foregoing insistence to be untenable, hence cannot be sustained. And, as to the further insistence to the effect that the case of Welder Williams v. State, 28 Ala. App. 73, 179 So. 915, and other designated cases of like import are unsound, and should be so declared and overruled, this court, without reference to the personal opinion of the writer, is without authority to so declare as a result of the inhibition and provisions of Section 7318 of the Code 1923. Towit: 'The decisions of the Supreme Court shall govern the holdings and decisions of the Court of Appeals, etc.'

"From what has been said, we see no escape from holding, that under the agreed facts upon which this case was tried and determined, the conviction of the defendant (appellant) was properly had and must obtain. It is therefore ordered, that the judgment of conviction from which this appeal was taken will stand affirmed."

In view of this holding that the possession of legally purchased alcoholic beverages in a county that has changed its status from "wet" to "dry," after such change, is illegal, even though the above quoted excerpt from Section 51, supra, only mentions "manufacture, sale or distribution" of such beverages, and does not mention possession, it seems clear that the manufacture of vinous and/or malt beverages in a county that has changed its status from "wet" to "dry," after such change, would be illegal.

The premises considered, each of your specific inquiries is answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
THE CAPITOL.

Judges of Probate—Section 7285, Code of Alabama, 1923—

1. The four hundred dollars provided for in Section 7285, Code of Alabama, 1923, for services in connection with the public roads, is payable on the office year basis, commencing on the date of the beginning of the term of office of the Judge of Probate.

2. Said sum is payable at the end of the office year, after the Judge of Probate furnishes proof that he has performed his duties in reference to public roads, and that his compensation for the office year did not exceed Five Thousand Dollars.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of March 5, 1941, in which you request my official opinion as follows:

"Please refer to Section 7285 of the 1923 Code of Alabama and specifically to the $400.00 stipulated to be allowed the Judge of Probate for discharging his duties in relations to public roads, when the net annual compensation does not exceed $5,000.00, and advise me in answer to the following:

"1. Is this $400.00 payable on a fiscal year basis or is it payable on a calendar year basis commencing with the date the Judge of Probate took office?

"2. Can this $400.00 be paid in advance or must it be paid, if due, at the end of the year, be it fiscal or calendar year?

"3. If you hold that the $400.00 is payable on a fiscal year basis, would a Probate Judge who went out of office at the close of business January 20, 1941 be entitled to his pro rata share of the $400.00 if during the 1940-41 fiscal year the net annual compensation of the office was under $5,000.00?

"4. If your answer to question No. 3 is in the affirmative, would it have any bearing on the matter if the Probate Judge who took office January 21, 1941 increased the office expenses over what they were from October 1, 1940 to January 21, 1941, and due to this increase in office expenses cause the net annual compensation for the fiscal year to be less than $5,000.00?"

In reply to your inquiry No. 1, I wish to advise that in my opinion the $400.00 to which you refer in your request, should be paid on an office year basis, commencing with the date of the beginning of the term of office of the Judge of Probate.

Section 2567, Code of Alabama, 1923, provides that the term of office of the Judges of Probate shall be for a term of six years from the first Monday after the second Tuesday in January next after their elections. Therefore, the office year basis upon which said payment should be made would run from the first Monday after the second Tuesday in January, to the same time in the following January. In other words, the office year would run concurrently with the years of the term of office.

Section 7285, Code of Alabama, 1923, in pertinent part, reads as follows:

"7285. **Fees allowed to judges of probate.**—Judges of probate are entitled to the following fees for the following services: * * *

"Discharging his duties in relation to public roads, on proof to the county commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding . . . . . $400.00.

"But this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars."

You will notice that said sum of $400.00 is to be paid annually after due proof has been made that said duties in reference to the public roads have been performed, and that the annual compensation did not exceed $5,000.00.

Under date of March 26, 1938, this office rendered an opinion to Hon. Nathaniel Almon, County Superintendent of Education, Lawrence County (Biennial Report, Attorney General, 1936-38, p. 597), in which a construction was placed upon the term "per annum" as used in Act No. 160, General Acts, 1936-37, p. 181. In this opinion it was held that the term "per annum" meant the years running concurrently with the years of the term of office of the county superintendent. I think the reasoning used in said opinion is good and that it is applicable in the present situation. To hold that said sum should be paid on a fiscal year basis would lead to endless confusion for the reason that the term of office of an outgoing judge of probate would expire in January, which would be approximately three and one-half months after the beginning of the then current fiscal year. This confusion can be avoided by paying said sum annually for each office year and letting said year begin with the date on which the judge of probate takes office in January. Your attention is also called to Quarterly Report of Attorney General, Volume XV, pp. 249, wherein analogous situations are discussed.

In reply to your inquiry No. 2, I wish to advise that in my opinion said sum should be paid annually at the end of the office year. The statute allowing said sum provides that the judge of probate shall not receive the same if his net annual compensation exceeds $5,000.00. In the face of this prohibitory provision, it seems that there would be no way to ascertain whether he was entitled to it until the end of the office year.

In "Words & Phrases", First Series, p. 403, we find the following rule of law:

> "The ordinary and natural meaning of a direction by one person to pay to another a specified sum 'annually', or each year, is that the specified sum is to be paid in an annual or yearly payment. The word or phrase, naturally interpreted, would be regarded as fixing both the measure and time of payment." Kearney v. Cruikshank, 22 N.E. 580, 582, 117 N.Y. 95; Henry v. Henderson, 33 South. 960, 964, 81 Mass. 743, 63 L.R.A. 616.

Again, in "Words & Phrases", Fourth Series, p. 163, we find the following:

> "'Annual salary' of officer provided for expressly by Rev. St. 1909, Sec. 10938 (Mo. St. Ann. Sec. 9463), and intended to be provided for by Rev. St. 1919, Sec. 11352 (Mo. St. Ann. Sec. 9463), fixing salary of county superintendent of schools according to population as shown by elections, does not refer to salary by calendar years, but by the years of incumbent's term, according to time of year when term commences, and salary must be calculated for year as a whole. State ex rel. Harvel v. Linville, 300 S.W. 1066, 1067, 318 Mo. 698."

The definitions and rules herein used in "Words & Phrases" seem to substantiate my theory that the $400.00, when due, should be paid by the

office year, beginning with the term of office of the judge of Probate, and that said sum should be paid at the end of the year rather than in advance.

In view of my answers to your inquiries numbered 1 and 2, it is obvious that inquiries numbered 3 and 4 do not call for answer.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1941.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Court Reporters—Counties—

No authority for county to pay fees of court reporter for transcribing sworn statements of witnesses to be presented to the Grand Jury.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 30, 1941, in which you request my official opinion as follows:

"Please advise me as to the following:

"Frequently the Circuit Solicitor takes sworn statements prior to the sessions of the Grand Jury for the purpose of using same before the Grand Jury, if necessary. These statements are transcribed by the Court Reporter and a bill is presented to the Board of Revenue for payment, one of which we have at this time which reads as follows:

" 'To transcript of sworn statements ordered by Honorable Keener Baxley, Circuit Solicitor, for Houston County Grand Jury..... $5.00'.

"I have before me your opinions addressed to Honorable M. W. Forman, Judge of Probate, St. Clair County and found Quarterly Reports Volume 2, Page 198; and also your opinion addressed to the Honorable E. P. Kingsberry, Circuit Court Reporter, Huntsville, Alabama, and dated December 12, 1938.

"In the light of these two opinions I would appreciate you advising me if the County could pay a Court Reporter or other stenographer directed to transcribe sworn statements or other testimony outside of the Grand Jury for the purpose of using same when the Grand Jury convenes."

In reply I wish to advise you that in my judgment, there is no authority of law for the county to pay a court reporter for a transcription of sworn statements ordered by the Circuit Solicitor for the purpose of using same before the Grand Jury.

According to your statement of facts, it appears that the statements referred to by you are to be used before the Grand Jury as evidence or for the purpose of impeaching a witness called before the Grand Jury if it is found necessary by the Solicitor so to do. As I understand your facts, the expense here named was not ordered by the Foreman of the Grand Jury nor by the Solicitor at the request of the Grand Jury. While this office has heretofore held that the county might pay costs incurred by the Grand Jury in having a court reporter transcribe the proceedings of a Grand Jury when the reporter was directed to transcribe the proceedings by the Solicitor or Foreman of the Grand Jury, this opinion is based upon the theory that the Grand Jury itself incurred the expense as a necessary feature of its investigation. This is not the case under your statement of facts. I refer you to the opinion of the Attorney General under date of February 24, 1936, addressed to Hon. M. W. Forman, Judge of Probate, St. Clair County, Quarterly Reports of Attorney General, Vol. 2, page 198. Cf: Opinions reported in Biennial Reports of the Attorney General, 1928-30, pages 710 and 1025.

Section 6734 of the Code of 1923, provides for the duties of court reporters and states, among other things, the following:

"When directed by the said judge, he shall attend the investigations of the Grand Jury and there take such notes of the testimony as directed by the Solicitor or Foreman."

The above quoted excerpt from the Code is the only provision of law that I find authorizing the direction of a court reporter to report testimony for the Grand Jury, and this does not contemplate the taking of sworn statements of witnesses where said sworn statements may or may not, as the discretion of the Solicitor shall direct, be presented to the Grand Jury.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1941.

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Thirteenth Judicial Circuit,
Mobile, Alabama.

Lis Pendens Notice—

1. On verified bill of complaint tc abate a nuisance under Code Sections 9280, et seq., Probate Judge must record the verified complaint and the lis pendens notice filed in his office under Section 9284 of the Code of Alabama, 1923.

2. No lis pendens notice is required to be filed in proceedings to abate a liquor nuisance under the Code of Alabama, 1923, Sections 4671-4672.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 10, 1941, is as follows:

"We have filed many Injunction Proceedings against blind tigers and houses of ill-repute, and are now preparing to file many more. It has been our custom to file in the Equity side of the Circuit Court, two copies of each bill and to file one copy of the bill together with the Lis Pendens Notice in the Probate Court. We now have pending in the neighborhood of four or five hundred of such proceedings. The Judge of Probate has asked us whether or not in our opinion it is necessary for that Court to record the bill as well as the Lis Pendens Notice. He states that he can see no reason for recording the bill and believes that all is necessary is to record the Lis Pendens Notice. In other words, the Judge of Probate wishes to know whether or not under the law it is necessary for him to record the entire bill as well as the Lis Pendens Notice, or whether or not it will comply with the rule by simply recording the Lis Pendens Notice.

"In my humble opinion I believe it is not necessary for the Judge of Probate to record the entire bill but only the Lis Pendens Notice. The purpose is to give notice to the outside world that the proceeding is pending and that the property described in the Lis Pendens Notice is affected by such proceeding. Each of such bill is made up of four closely written pages and when we deal with some hundreds or more of them it puts a great volume of work on the Probate Court.

"I will be pleased to have you advise me whether or not in your opinion it is necessary for the Judge of Probate to record on his record the entirely proceeding or only the Lis Pendens Notice."

As a basis for your question, you state that you have filed many injunction proceedings against "blind tigers" and houses of ill repute; that it has been your custom to file in the Equity side of the Circuit Court two copies of each bill, and to file one copy of the bill, together with the lis pendens notice, in the Probate Court.

A bill to abate a liquor ("blind tiger") nuisance rests on Sections 4671, et seq., of the Code of Alabama, 1923. To abate the nuisance of maintaining a house of ill repute, the proceeding rests on Sections 9280, et seq., of the Code of Alabama, 1923.

In the proceeding under the Code Sections 4671, et seq., 4672 provides what is necessary to allege in the bill. There is nothing in the entire article of the Code dealing with the abatement of a liquor nuisance that requires a filing of the bill or complaint, or a lis pendens notice, in the office of the Probate Judge. The proceeding under these sections does not undertake to fasten any lien on, or to acquire any title to, real estate. Hence, there is no occasion for any lis pendens notice. As the statute does not require this to be done, then it is not proper or necessary to do so. Our Supreme Court seems to have recognized this construction. In the case of **Moseby et ux v. Roche** et al, 233 Ala. 280, 171 So. 351, the Court used this language:

> "The bill is not filed to abate such niusances as are defined by Section 9280, Code, where the requirments of Section 9284, Code, must be observed."

Where the bill of complaint seeks to abate nuisances under Section 9280, et seq., the complainant, at or before the commencement of the action, must file in the office of the probate judge a verified complaint alleging the facts constituting the nuisance, together with a notice of the pendency of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. This section further provides that the probate judge shall be paid the usual fee for recording such lis pendens, and that he shall immediately record such notice. It is quite clear from the provisions of this section that the verified complaint that is required to be filed constitutes a part of the lis pendens notice. The provision providing that the probate judge shall be paid the usual fee for recording "such lis pendens" clearly shows this by the use of the phrase "such lis pendens," That is to say, a verified complaint, together with the described notice of lis pendens.

At any rate, our Supreme Court, in the case of **Brown v. State ex rel. Wright,** 222 Ala. 623, 133 So. 913, in dealing with this section, says:

> "We are of opinion, however, upon a study of the general scheme of the statute, that the filing of a verified complaint, together with a lis pendens notice, for record in the office of the judge of probate 'at or before' the commencement of the suit, is mandatory, and an essential part of the procedure, which should be averred and proven in the cause."

Continuing, the Court says:

"This statute calls for more than the mere notice of lis pendens. The verified complaint charging a nuisance of this class at a designated place, and maintained by named persons, is required in addition to the usual form of lis pendens notice. True, the same information in general is contained both in the complaint and the lis pendens notice. But a verified complaint is expressly required."

On this holding, the Court treats the verified complaint and the notice as a whole, and as constituting lis pendens notice.

From the foregoing, it follows that my opinion is that it is the duty of the probate judge to record both the verified complaint and the lis pendens notice when filed in his office in a proceeding to abate a nuisance under Sections 9280, et seq., of the Code of 1923, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 21, 1941.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Judge of Probate—Chief Clerk—Infants—

A person nineteen years of age, who has had the disabilities of non-age removed is not qualified to perform the duties of chief clerk to the Judge of Probate.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion under date of January 30, 1941, is as follows:

"Please advise me as to the following at your earliest possible convenience:

"My clerk is now under bond but is only nineteen years old. If he should have his disabilities of non-age removed in your opinion do you think he would then be qualified to perform the duties of Chief Clerk as defined in the Code of 1923, Sec. 9592."

The procedure for the removal of the disabilities of non-age of infants and minors, and the effect of such removal, is found in Chapter 303, Sections 8280-8287 of the Code of Alabama, 1923. As to the effect of an unconditional removal of the disabilities of non-age of an infant and minor, Section 8284 of the Code of Alabama, 1923, reads as follows:

"8284. **Decree and its affect.**—If on the hearing of the evidence adduced, and upon such other evidence as may be required by the court, the court shall be satisfied that it will be to the interest of such minor to be relieved from the disabilities, the court shall thereupon decree accordingly, and such decree shall have the effect of investing such minor with the right to sue and be sued, contract, to buy, sell and convey real estate, and generally to do and perform all acts which such minor could lawfully do if twenty-one years of age, except as hereinafter provided."

However, the Supreme Court of Alabama, in the case of **Hutchinson v. Till,** 212 Ala. 64, 101 So. 676, in dealing with Chapter 96 of the Code of Alabama, 1907 (the forerunner of Chapter 303 of the Code of Alabama, 1923), held:

"By the common law persons became sui juris at 21 years of age. The Legislature has full power to prescribe a different age. This power was sometimes expressed by special statute, until forbidden by section 104, Constitution of 1901, subd. 2. A general statute removes the disabilities of married women over 18 years of age. Code, 1907, Sec. 4499.

"Chapter 96, Code of 1907, Sec. 4505 et seq., provides for a judicial proceeding to that end.

"The jurisdiction thus conferred is statutory and limited."

Section 177 of the Constitution of Alabama, 1901, provides that for a person to be a qualified elector of the State of Alabama, he must, among other things, be "twenty-one years old or upwards." Since this is a Constitutional requirement, and, as held by the Supreme Court in the case of **Hutchinson v. Till,** supra, the procedure for the removal of the disabilities of non-age of infants and minors is statutory, the removal of the disabilities of non-age of an infant or minor could not affect this constitutional requirement for a qualified elector; and an infant or minor, even though he had had his disabilities of non-age removed, could not become a qualified elector.

Section 2575 of the Code of Alabama, 1923, provides in pertinent part:

"2575. **Persons ineligible to office.**—The persons who are ineligible to, and disqualified for holding office under the authority of this state, are—
1. Those who are not qualified electors, except as otherwise expressly provided."

So, we come to the question of whether or not the Chief Clerk to the Judge of Probate holds an "office under the authority of this state."

Section 9591 of the Code of Alabama, 1923, gives to the Judge of Probate the authority "to employ, at his own expense a chief clerk and such other clerks as he deems necessary, for whose official acts he is responsible". Section 9592 of the Code of Alabama, 1923, sets out the authority of the Chief Clerk. Section 9593 thereof makes provision for his oath and bond, and Section 9594 empowers him to continue to perform the duties of his office pending a vacancy in the office of the Judge of Probate. These sections appeared in substantially the same form, so far as the legal effect thereof is concerned, as Subdivision 6 of Section 795 of the Code of Alabama, 1886, as amended by Act No. 523, S. 168, approved February 21, 1893 (General Acts, 1892-1893, page 1190). The Supreme Court of Alabama, in the case of **Scruggs v. State,** 111 Ala. 60, 20 So. 642, in considering whether or not a clerk of the Judge of Probate, appointed under and by virtue of said Subdivision 6 of Section 795 of the Code of Alabama, 1886, as amended, supra, was a public officer, spoke as follows:

> "The first question for consideration is, whether the defendant was a public officer within the meaning of the statute. The evidence shows that he was a clerk of the probate judge, appointed under and by virtue of sub-division 6 of section 795 of the Code, as amended by statute of February 21st, 1893, (Acts 1892-93, p. 1190), and that he had given bond and qualified by taking the oath prescribed by the statute. A mere reading of the statute is sufficient, without argument, to show that the defendant is a public officer. He has not only ministerial duties to perform, which are prescribed by statute, but judicial authority and power is expressly conferred on him by the statute. His power is but little less than that of the judge himself."

Cf. **Jeffers v. Wharton,** 197 So. 352, Certiorari Granted, 197 So. 358.

The premises considered, it is my opinion that the Chief Clerk to the Judge of Probate is a public officer, or that he holds an office under the authority of this State; and since a person holding an office under the authority of this State must be a qualified elector, and an infant or minor, even though he has had his disabilities of non-age removed, cannot be a qualified elector, then such a person is not qualified to perform the duties of the Chief Clerk to the Judge of Probate.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 22, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Municipalities—Tax Exemptions—Lease-Sale Contract—Tax Sales —Cancellation.

1. Property sold by municipality to satisfy unpaid public improvement assessments and purchased by and conveyed to such municipality is not subject to assessment for state and county ad valorem taxes ordinarily.

2. If, however, the municipality enters into executory contract for sale of such property and the vendee therein is in possession of said property under said contract, said property is subject to assessment for state and county taxes as the property of the vendee, and vendee is entitled to homestead exemptions therein to the same extent as if he held title thereto.

3. In the absence of such contract, said property is exempt from taxation under Constitution, 1901, Sec. 91 and Revenue Act, 1935, Section 2 (General Acts, 1935, p. 256).

4. If such property was sold to the State at a time when it was so exempt, said sale may be cancelled pursuant to Section 6851 of the Code of 1923, as amended (General Acts, 1931, p. 674).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated November 22, 1940 is as follows:

"On April 5, 1940 Mr. Edward L. Barber purchased through lease-sale contract from the City of Tarrant City, a municipal corporation, the following described property:

"Lots 1 and 2 Block 13 Bentley's Addition to Bartonville.

"The wording of the contract is as follows:

" 'LEASE SALE CONTRACT

THE STATE OF ALABAMA,)
COUNTY OF JEFFERSON.)

" 'THIS LEASE made this the **5th** day of **April**, A.D., 1940, by and between the City of Tarrant City, a municipal corporation, party of the

first part and **Edward L. Barber,** Party of the second part.

WITNESSETH:

" 'That the party of the first part does hereby rent and lease unto the party of the second part the following premises in the City of Tarrant City, in Jefferson County, Alabama, to-wit:

Lots 1 and 2 Block 13 Bentley's Addition to Bartonville.

for the term of **9 years** to-wit: from the **5th** day of **April, 1940,** to the **5th** day of **April, 1949.**

" 'IN CONSIDERATION, THE party of the second part agrees to pay to the party of the first part the sum of .....One Thousand and No/100..... Dollars, of which sum $100.00 is paid in cash, the receipt of which is hereby acknowledged, the balance of $900.00 is divided into 9 payments of $100.00 each bearing legal interest, payable at the office of the City Clerk of the City of Tarrant City, Alabama, on the 5th day of each April during the said term, in advance, being at the rate of 8% per annum. And should the party of the second part fail to pay the rents as they become due, as aforesaid, or violate any other condition of this Lease, the said party of the first part shall then have the right at its option to re-enter the premises and annul this Lease. And in order to entitle the party of the first part to re-enter, it shall not be necessary to give notice of the rent's being due and unpaid, or to make any demand for the same, the execution of this Lease signed by the said parties of the first and second part, which execution is hereby acknowledged, being sufficient notice of the rents being due and the demand for the same, and shall be so construed, any law, usuage or custom to the contrary notwithstanding. And the party of the second part agrees to comply with all the laws in regard to nuisance, in so far as premises hereby leased are concerned, and by no act render the party of the first part liable therefor, and to commit no waste of property, or allow the same to be done, but to take good care of the same; nor to under-lease said property nor transfer this Lease without the written consent of the party of the first part, hereon endorsed; and further, this Lease being terminated, to surrender quiet and peaceable possession of said premises in like good order as at the commencement of said term, natural wear and tear excepted.

" 'In the event of the employment of an attorney by the party of the first part, on account of the violation of the conditions of this Lease by the party of the second part, the party of the second part hereby agrees that he shall be taxed with said attorney's fee. And as a part of the consideration of this Lease, and for the purpose of securing the party of the first part prompt payment of said rents as herein stipulated, or any damage that party of the first part may suffer, either by failure to surrender quiet and peaceable possession of said premises, as aforesaid, or for any damage whatever, may be awarded said party of the first part under this contract, the said party of the second part hereby waives all right which **he** may have under the Constitution and laws of the State of Alabama, to have any of the personal property of the party of the second part exempted from levy and sale, or other legal process.

" 'The party of the second part agrees to pay all taxes on the above described property during said term as the same becomes due; and also agrees to pay all assessments for street and sidewalk improvements, should any be made against said property.

" 'It is understood and agreed that at the end of said term if the party of the second part has complied with each and all conditions of this Lease then the party of the first part agrees that the rent paid under this Lease shall be considered a payment for said property, and the party of the first part shall make and execute a deed conveying to the party of the second part all of the right, title, interest and claim in or to said real estate which the party of the first part acquired by the purchase thereof at a sale for the payment of Sewer and Street improvements on the 1st day of August, 1932 Ord. No. 28 and 34-A Sale Pro No. 32-75, 32-115, 32-76, & 32-116 and the deed to the City of Tarrant City dated 1st day of August 1932, and recorded in record of deeds, Vol. 2450 Page 552 in the office of the Judge of Probate of Jefferson County, Alabama.

" 'It is further understood and agreed that if the party of the second part fails to pay the annual rent as it becomes due, and becomes as much as two months in arrears during the first part of the existence of this Lease, or as much as three months in arrears on such payments at any time thereafter, or should fail to pay the taxes on the said property when the same becomes due, or should fail to comply with any condition or requirement herein, then on the happening of any such event the party of the scond part forfeits his, her, its or their right to a conveyance of said property, and all money paid by the party of the second part under this contract shall be taken and held as payment of rent for said property, and the party of the second part shall be liable to the party of the first part as a tenant for the full term of said Lease, and the provisions herein that the rent paid under this Lease shall be considered a payment for said property, and the party of the first part shall make and execute a deed conveying to the party of the second part the said right, title, interest and claim in or to said real estate shall be a nullity and of no force or effect; and the failure of the party of the second part to comply with any of the conditions of this instrument shall ipso facto render the said provision a nullity, and make the said party of the second part a lessee under this instrument, without any rights whatever except the rights of lessee without any notice or action whatever upon the part of the party of the first part.

" 'It is further understood and agreed that if the party of the second party should at any time before the maturity thereof desire to pay off the remaining monthly payments as named herein he shall have the right to do so, and shall be entitled to a rebate on such advancements of all unearned interest, it being intended that only the earned interest shall be collected.

" 'IN TESTIMONY WHEREOF, the City of Tarrant City has caused these presents to be executed for it and in its name by A. M. Cambron its Mayor, and to be attested and its corporate seal herein affixed by Z. D.

McCuen, its City Clerk, and the party of the second part has hereunto set his hand and seal, all done in duplicate, this 5th day of April A. D., 1940.

CITY OF TARRANT CITY

By A. M. Cambron (SEAL)

Edward L. Barber (SEAL)

ATTEST:

Z. D. McCuen .....(SEAL)'

City Clerk.

"Mr. Barber desires to assess and claim homestead exemption on this property, which I have not allowed pending an official opinion from you. If you will note in the above contract the City of Tarrant City purchased this property August 1, 1932 in a Public Improvement sale. Also on April 27, 1939 this property was sold to the State of Alabama for 1937 taxes. Said sale still remaining on record.

"Please render an opinion on the following questions:

"1. Should this property be assessed in Mr. Barber's name for tax year 1941?

"2. If your answer is in the affirmative, should he be allowed to claim homestead exemption for 1941?

"3. If your answer is in the affirmative, should the tax sale be removed from the records and if so by what procedure?

"4. If the tax sale to the State was invalid and Mr. Barber is not entitled to assess this property, should this property be put back on our records in the name of 'City of Tarrant City' and exempted from taxation until the lease sale contract is paid out?"

This office has ruled that property redeemed by a municipal corporation from sale for State and County taxes in order to protect its own claim for taxes, is thereafter exempt from payment of State and County taxes so long as held by the municipality. (Biennial Report, Attorney General, 1936-1938, page 762; Opinion to Mrs. C. F. Hart, Tax Assessor, Covington County, Quarterly Report, Volume XII, page 161).

It has also been ruled by this office that property sold to a city at tax sale prior to assessment date for State and County taxes, and not redeemed from such sale to the city, is not subject to assessment for the years owned by the city; and that assessment thereof for State and County taxes thereafter was erroneous and allowable as such to the Tax Collector under Section 178 of the Revenue Acts of 1935. (Biennial Report, Attorney General, 1934-

1936, page 667; Quarterly Report, Volume III, page 134; Opinion dated May 15, 1936, to Hon. H. E. Kendrick, Tax Collector, Dallas County).

See also Constitution of Alabama, 1901, Section 91; Revenue Act of 1935, Section 2(a), General Acts, 1935, page 257 and **In Re Opinion of the Justices,** 235 Ala. 485, 179 So. 535, declaring the exemption of municipally owned property, and of property held by a municipal administrative agency.

So, also, in the opinion of this office dated February 25, 1938 to Hon. Lee N. Blackwood, Tax Collector, Blount County, (Quarterly Report, Attorney General, Volume X, page 105) it was held that a dam in Blount County constituting an essential part of a city's municipal waterworks system was exempt from State and County taxes.

In **Crow, Tax Collector, v. Outlaw,** 225 Ala. 656, 145 So. 133, Outlaw, under an executory contract between himself and the City of Mobile, was in possession of certain property belonging to the city against which State and County taxes had been assessed in his name as escapes. In this contract the city had agreed, upon payment in full of the purchase money, to convey the property to the vendee. He filed a bill to enjoin sale by the tax collector of the property for unpaid taxes so assessed in his name, and in support of the bill urged that said property, being the property of a municipal corporation in which legal title was vested, was exempt from taxation as provided in Section 91 of the Constitution, supra.

In response to this insistence, however, the Supreme Court on page 657 of its opinion observed:

> "The bill as originally filed sought injunctive relief against the sale for taxes of the real estate therein described, upon the theory that, though complainant was in possession under an executory contract of purchase from the city of Mobile, yet no conveyance had been executed and the legal title remained in the city, and the property was therefore exempt from taxation. But in State v. White Furniture Co., 206 Ala. 575, 90 So. 896, the court said: 'It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner.' The theory of the original bill was therefore untenable."

It might be said that the foregoing pronouncement was dictum inasmuch as in that case the temporary injunction granted by the lower court was dissolved on other grounds—the court holding that complainant had an adequate remedy at law and that it would not enjoin collection of alleged illegal taxes in the absence of some independent ground of equitable jurisdiction.

I feel bound, however, to follow the above statement of law quoted from **Crow v. Outlaw,** so that the opinions of this office above referred to must be qualified to this extent, viz: That if the municipality has executed a contract for sale of its property however acquired, whether by purchase to satisfy unpaid public improvement assessments or otherwise, and the vendee in such

contract is in possession of such property thereunder, it is subject to assessment for ad valorem taxation as the vendee's property, although legal title thereto may still be vested in the vendor or municipal corporation.

You are therefore advised as follows:

(1) This property should be assessed in Mr. Barber's name for the tax year 1941.

(2) He is therefore entitled to homestead exemption therein to the extent he would be so entitled if he had legal title to said property.

(3) Inasmuch as the property was not subject to assessment for State and County Taxes at the time it was sold to the State for 1937 taxes on April 27, 1939, for the reasons hereinabove stated in the first part of this opinion, such sale was void, and provision for cancellation thereof is found in Section 6851 of the Code of Alabama of 1923, as amended by Act No. 592, H. 374, approved August 4, 1931 (General Acts 1931, p. 674) which reads as follows:

> "6851. Governor May Convey Or Alienate State Lands. As to all lands or lots owned or claimed by the State of Alabama and not presently used for governmental purposes, where there is no other specific mode by which the state may convey such lands, the governor of Alabama may request the written opinion fo the attorney-general of Alabama as to whether such conveyance is proper, and if the governor is satisfied that such conveyance is proper, he may execute a conveyance to any purchaser or claimant of such lands so owned or claimed by the State, which conveyance shall be executed in the name of the State by the governor of Alabama, attested by the secretary of state, who shall affix the great seal of the state thereto, and such conveyance shall pass all title or claim which the State of Alabama may have in or to lands so conveyed. When it is made to appear to the satisfaction of the attorney-general, by the owner or claimant of any such land so owned or claimed by the state, that such land has been previously conveyed by the state and the original conveyance or a duly certified copy thereof cannot be located or obtained, or that the state has lost its interest in such land by adverse possession, a conveyance may be executed to the purchaser, owner, or claimant, as herein authorized."

Inasmuch as neither Section 232 nor Section 247 of the Revenue Act of 1935 (General Acts, 1935, pp. 256, 357, 361) is applicable to the instant situation (Quarterly Report Attorney General, Vol. XVIII, page 144, Opinion to Hon. Matt A. Boykin, Judge of Probate, Mobile County), I am of opinion that the procedure prescribed by Code Section 6851 as amended, supra, should be followed in order to cancel the erroneous sale of this property to the State for 1937 taxes on April 27, 1939. Opinion to the State Comptroller under date of October 28, 1940 (copy enclosed).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 25, 1941.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Counties—Taxation—Executory Contracts of Purchase—

Real property in possession of County under executory contract of purchase, not subject to ad valorem taxes.

Ad valorem taxes must be paid by one who owns the property at the beginning of the tax year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

The request of your predecessor in office for official opinion bearing date of December 30, 1940, is as follows:

"As Probate Judge and head of the Court of County Commissioners of Colbert County, I respectfully propound to you the question hereinafter set out.

"Colbert County proposes to buy a parcel of land in the City of Tuscumbia, Alabama, upon which is located a two story building. The purpose of this purchase is to provide office space for necessary county functions and for which the present Court House is inadequate. It is proposed that the sale will be made as follows: The County will pay $1000.00 of the purchase price in cash, and the balance of the purchase money will be paid in monthly installments. A contract will be executed with the owner which will provide that when all purchase money has been paid a deed will be executed by the owner to the County. The contract will further provide that the County will be entitled to, and shall have, immediate and continued possession of the property so long as said contract shall not be in default.

"Will you please advise if, upon execution of the contract and making of down payment, and the taking of possession of the property by the County, said property would be relieved from ad valorem taxation, state, county and city, under Section 91 of our Constitution and whether such exemption would continue so long as the County remains in possession of the same and devotes its use to county purposes. Please also advise if the exemption is allowable, whether it would be allowable for the pro rata portion of the year 1941, after the execution of the contract and the taking of possession by the County.

"I respectfully refer you to the case of Boone v. G. F. and A. Ry. Co. 201 Ala. 560, 78 So. 956, in which the question is almost decided. You

might also be interested in City of Huntsville v. Madison County, 166 Ala. 389, 52 So. 326, and Griel Bros. Company v. City of Montgomery, 182 Ala. 291, 62 So. 692."

In order to properly answer your first question, it will be necessary to have before me the type of instrument and the exact terms of the instrument contemplated by you. However, from the facts set out in your letter, it seems that before October 1, 1941, the County will take possession of the property under an executory contract of purchase to wit: will make a down payment at the time possession is delivered and further agree to pay a stipulated amount monthly until the full agreed purchase price is paid, at which time the vendor will execute a deed to the County for said property. This being the case, I am of the opinion that the property in question would be exempt from State, County and City ad valorem taxes, beginning with the taxes assessible as of October 1, 1941 and payable October 1, 1942.

The Supreme Court of Alabama in the case of **Crow, Tax Collector v. Outlaw**, 225 Ala. 656, 145 So. 133, said:

"The bill as originally filed sought injunctive relief against the sale for taxes of the real estate therein described, upon the theory that, though complainant was in possession under an executory contract of purchase from the city of Mobile, yet no conveyance had been executed and the legal title remained in the city, and the property was therefore exempt from taxation. But in State v. White Furniture Co., 206 Ala. 575, 90 So. 896, the court said: 'It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner.'"

Applying the above set out rule, it follows conversely that the county (the vendee in the present case) would be taxed as the owner. However, Section 91 of the Constitution of 1901 and Section 2 of the Revenue Act of 1935, (Act No. 194, H. 324, General Acts, 1935, p. 256), specifically exempt from ad valorem taxation all property, real and personal, of the county. Cf. opinion to Hon. Roy Johnson, Tax Assessor, Jefferson County under date of March 22, 1941. (Copy enclosed.)

Since I am of the opinion that this property is exempt from ad valorem taxation, you wish to be advised whether such exemption is allowable for the pro rata portion of the year 1941, after the execution of the contract and the taking of possession by the county.

I am of the opinion this question should be answered in the negative. This property was assessed as of October 1, 1940, to the vendor and he is liable for taxes which were assessed as of October 1, 1940 and payable as of October 1, 1941.

In this connection I call your attention to the case of **State v. Alabama Educational Foundation**, 231 Ala. 11, 163 So. 527, wherein Mr. Justice Foster, speaking for the court, said:

"Tax upon property is not only a personal charge against the taxpayer (Union Bank & Trust Co. v. Phelps, 228 Ala. 236, 153 So. 644; Perry County v. Selma, M. & M. R.R. Co., 58 Ala. 546), but it must be paid by the one who owns the property at the beginning of the tax year, who is personally bound to pay it, whatever may occur as to its ownership thereafter, or its physical status."

In regard to the above, I am not passing upon the validity of the proposed instrument. In this connection I call your attention to the following opinions of this office. (Quarterly Reports of Attorney General, Volume V, p. 26; Quarterly Reports of Attorney General, Volume VIII, p. 23; Quarterly Reports of Attorney General, Volume XVIII, p. 37.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1941.

Hon. O. C. Bottoms,
Superintendent of Education,
Etowah County,
Gadsden, Alabama.

Schools—Board of Education—Purchases—

1. Purchases made by principal without authority of Board of Education may be ratified and paid for by the Board when the material purchased is used for the benefit of schools.

2. The statute of limitations is a defense to payment of debts which may or may not be resorted to.

3. Obligations outstanding on October 1, 1939, must be itemized and filed before December 1, 1939, in order to be paid by the County Board of Education.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your request for official opinion under date of January 18, 1941, is as follows:

"The Etowah County High School bought lumber and material from a local lumber company without authorization or authority from the County Board of Education or the County Superintendent of Education

at various times from 1930 to 1935. The local lumber company recently presented a bill to the County Board of Education praying for a 50% settlement which amounts to about $163.00.

"I would like to have your opinion relative to the following questions:

"1. Would the County Board of Education be within its legal rights to pay this or any part of this bill?

"2. It would appear that the statute of limitation has run against this obligation. If the County Board of Education would otherwise have the power to pay this obligation what effect, if any, would the running of the statute of limitations have on that power?

"3. May debts made by principals or teachers not authorized by the County Board of Education and the materials used for the benefit of the schools be paid by the County Board of Education, if they so will?"

In answering your inquiries, I deem it advisable to answer your questions in reverse order.

Your third question is whether or not the County Board of Education has the authority to pay for material bought without the authority of the Board of Education by principals and teachers for the benefit of the schools.

Of course, there is no question but that the County Board of Education is vested with the authority to purchase this material. See authorities cited in an opinion to Hon. Rascoe Maddox, Superintendent, Chilton County Board of Education, under date of April 30, 1940 (Quarterly Report of Attorney General, Vol. XIX, page 113). If, then, the County Board of Education could have bought this material in the first instance, can they subsequently ratify the purchase, although made without authority, and pay for the material?

In my opinion, this proposition is properly answered in the affirmative.

It is the general principle of law that where material has been used for the benefit of an agency of government, there is an implied duty on the part of the agency to pay for same. This doctrine has been held sound in the following cases:

Newman v. City of Opelika, 224 Ala. 70, 139 So. 247;

Allen v. Intendant and Councilmen of LaFayette, 89 Ala. 641, 8 So. 30;

General Electric Company v. Town of Fort Deposit, 174 Ala. 179, 56 So. 802;

Town of Clanton v. Chilton County, 205 Ala. 103, 87 So. 345.

This general principle has been extended in the case of **Greeson Manufacturing Company v. County Board of Education,** 217 Ala. 565, 117 So. 163. In that case, the Court held that where the County Board of Education could

have legally bought certain material that they would be required to pay for same when used for its benefit, even though there was no legal contract for the purchase of the material in accordance with the statutes regulating such purchases.

Without deciding whether or not the County Board of Education could be forced to pay for this material, it seems that the above cited cases would certainly be authority for the County Board of Education to ratify the purchase of the material and pay for same if they so desired.

An analogous situation was presented to this office in an opinion to Hon. J. A. Keller, State Superintendent of Education, under date of August 19, 1936, (Quarterly Report of Attorney General, Vol. IV, page 142). In that opinion it was held that where a disbursing officer had made certain purchases without the authority of the Board of Education for material used in the repairing of a school building that the County Board could legally reimburse said officer for the purchase of the material.

The premises considered, it is therefore my opinion that the County Board of Education has the authority to ratify purchases made by principals and teachers for materials used for the benefit of the school and to pay for same.

In your second question you inquire as to what effect the running of the statute of limitations would have on the authority to ratify the purchases and pay for same. I assume you have reference to the statute (Section 8947, Code of Alabama, 1923) requiring that actions to recover money due by an open account be brought within three years from the date of the last item of the account.

The statute of limitations is a defense which may or may not be resorted to. **Broadus v. Lindsey**, 17 Ala. App. 342, 84 So. 776. It is not jurisdictional and would have no effect on the authority of the County Board of Education to ratify the purchase of, and pay for, the material in question. The fact that the statute of limitations has run on the account in question would be a bar to the payment of such account if such defense was desired, but it would have no effect on the authority of the Board to pay same. Cf. Opinion to Hon. I. I. Moses, Chairman, County Commission, Russell County, Phenix City, Alabama, under date of March 29, 1939 (Quarterly Report of Attorney General, Vol. XIV, page 275).

Your first question is specifically whether or not the county Board of Education can legally pay for the material purchased without authority some five or six years ago. The above general discussion, of course, is applicable to this situation. However, there is another obstacle to the authority of the Board to pay for these particular purchases.

Section 11 of Act No. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610), reads as follows:

> "Section 11. UNFUNDED DEBTS.—If any county or city board of education has outstanding on October 1, 1939, any unfunded or floating

debts, an itemized statement of the same shall be filed by said board with the State Superintendent of Education not later than December 1, 1939. Upon the approval of the State Superintendent of Education said board shall have the authority to pay said floating debts from any balances on hand at the close of any fiscal year provided that this authority shall expire on October 1, 1945."

This office has held in an opinion to Hon. Joe W. Baker, Chairman, Board of Education, Cherokee County, under date of April 19, 1940 (Quarterly Report of Attorney General, Vol. XIX, page 71), that where the Board has an outstanding debt on October 1, 1939, and same was not itemized and filed priod to December 1, 1939, there was no authority to pay the debt. See, also, opinion to Mr. W. H. Black, Superintendent, Marshall County Schools, under date of February 12, 1941, a copy of which is enclosed for your convenience.

The question, then, to be determined is whether or not the bill for this material was an outstanding debt on October 1, 1939. If it was, and it was not itemized and filed in accordance with Section 11, supra, there is no authority for the County Board of Education to pay same. From a reading of the Greeson case, supra, it is seen that the legal obligation to pay for material used on a school building arose when the material was actually used. The authority of the Board to pay claims of this nature is dependent on the moral obligation arising at the time of the use of the material, rather than on a legal contract. Therefore, it is my opinion that unless this obligation has been itemized and filed in accordance with the above quoted Section 11, there is no authority for the County Board of Education to pay this four or five-year old bill.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 25, 1941.

Hon. Isaac Johnson, Jr.,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Counties—Lawrence County—

The Commissioners Court of Lawrence County has authority to purchase trucks to be used in the establishment, construction and maintenance of public roads and bridges, if, in their sound judgment, the use of the same are necessary and advisable.

Such trucks, if purchased, can **only** be used in the establishment, construction and maintenance of public roads and bridges.

Members of the Commissioners Court cannot use such trucks for personal purposes nor in the performance of their official duties.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of February 27, 1941, in which you request my official opinion as follows:

"Will you kindly give me an opinion on the following: Has the County authority to buy pick-up trucks that are used by the commissioners; (each of the four (4) commissioners have a pick-up and it seems that some of them are apparently being used for personal uses along with other uses). If the County has authority to buy these trucks, what are the purposes for which said trucks may be used as well as some of the purposes for which they may not be used.

"I will appreciate a full and general explanation of the uses as well as to the authority of the County in purchasing the same."

In your request you did not refer to any local acts; therefore I am assuming that your County Commissioners are acting under the general laws of the State, and will answer your inquiry accordingly.

I shall first pass on the authority of the County to purchase trucks. I call your attention to Section 157 of the State Highway Act, approved August 23, 1927 (General Acts, 1927, p. 391—now Section 1397 (110) Michie's Code of 1928), which reads as follows:

"1397(110). **Powers of courts of county commissioners with regards to roads, bridges and ferries.**—The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have general superintendance of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article, courts of county commissioners, boards of revenues, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

The Supreme Court of Alabama, in the case of **Ensley Motor Co. vs. O'Rear, Treasurer,** 196 Ala. 481, 71 So. 704, had the following to say in reference to the duties, authorities and powers of Commissioners Courts:

"In the location, erection, repair, or removal, or in the furnishing of the county's buildings, bridges, and roads, the court of county commission or board of revenue have a discretion that cannot be exercised for them by any other county official, or directed by any court, except only when their acts are such as amount to fraud, corruption, or unfair dealing. In the performance of these statutory duties, boards of revenue and courts of county commissioners exercise a function that is quasi legislative.

* * * * *

"It is thus apparent that the statute invested in courts of county commissioners or boards of revenue general superintendence over the roads and bridges of the respective counties, and that in the construction, maintenance and improvement of roads and bridges unlimited jurisdiction and power is given, except only as it may be limited by the local or special statutes of force in the county. Such courts or boards may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may by such courts or boards be deemed necessary or advisable, to build, construct, work, improve and maintain a good system of public roads, bridges and ferries in their respective counties. Acts 1915, p. 573, Section 1. This power is to be exercised by such courts or boards as deemed necessary or advisable for the public weal, and cannot be exercised for them, nor can their exercise thereof be restrained or reviwed, unless it has been in a fraudulent, corrupt, or unfair conduct of the business of the county.

"With the more recent demands for better roads and more secure bridges and ferries in all sections of the country—in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities—greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. So also, if the necessary material, equipment, and labor, for the proper construction and maintenance of the public roads, bridges, and ferries may be purchased or engaged, and the services of a competent engineer or inspector are required to construct or supervise such public improvements, there can be no doubt of the right to contract therefor. And if the right exists to contract for this inspection and supervision, then the right to maintain, and to transport such inspectors from one portion of the county to another, in the discharge of this public service, cannot be doubted."

It will be observed that such Courts have unlimited jurisdiction and and powers in reference to the establishment, construction and maintenance of roads and bridges, and that in the proper exercise of these powers for the public weal, such courts have a discretion that cannot be exercised for them

by anyone else. Neither can the exercise thereof be reviewed or restraind, unless it amounts to a fraudulent, corrupt or unfair conduct of the business of the County.

Based upon what appears to be the law in the **Ensley Motor Co.** case, supra, I am of the opinion that your County Commissioners have the authority to purchase trucks to be used in the establishment, construction and maintenance of public roads and bridges if in their sound judgment and discretion the use of the same are necessary and advisable for the best interest of the public.

As to the use that may be made of such trucks, I wish to advise that in my opinion they may be used **only** in the establishment, construction and maintenance of the public roads and bridges. The use of the same for any other purpose would be illegal. Neither the Commissioners nor any one else would be permitted under the law to use them for personal purposes. The use of such by the Commissioners for personal purposes would amount to a diversion of county property, for which a forum is open to restrain such illegal use, and the member so abusing his trust would be liable to the County. Not only can the misuse of the trucks be restrained, but the purchase of the same may also be restrained if such purchase is not necessary and amounts to a fraudulent, corrupt or unfair dealing on the part of the Commissioners. In the **Ensley Motor Co.** case, supra, the Supreme Court had the following to say in reference to the illegal purchase or use of materials and supplies for a county:

> "And if any court of county commissioners or board of revenue, as the business agent of the county, should attempt to so contract for machinery, materials, skilled services, or labor, as to amount to a fraudulent, corrupt, or unfair dealing on its part, or as the custodian of such property of the county, should attempt to so misuse, or authorize the misuse of, such property of the county, as to constitute a diversion of the property or funds of the county to a personal, rather than to the county use, a forum is open to restrain such fraudulent conduct, and the member or members of the board so abusing their trust would be liable to the county therefor."

I wish also to point out that this opinion is not in conflict with the opinion of this office dated February 27, 1929 (Biennial Report, Attorney General, 1928-30, p. 205), in which it was held that the Commissioners Court of Colbert County could not purchase automobiles for the use of its members in the performance of their official duties. That opinion states a correct proposition of law, which is applicable to your County. Your Commissioners receive a per diem and mileage for the performance of their official duties, and the County could not furnish them with automobiles to be used for such purposes.

I would also like to call your attention to the fact that this opinion is not in conflict with the opinion rendered by me under date of December 19, 1940 (Quarterly Report, Attorney General, Vol. XXI, p. 228), in which it was held that DeKalb County could purchase automobiles to be used in the construction, maintenance and supervision of public roads and bridges, and that the members of the Court could use the same in making their official

inspection of the roads and bridges of DeKalb County. The difference being that in DeKalb County, by a local act under which they operate, the Commissioners do not receive mileage. In your County the Commissioners receive mileage, and, therefore, cannot use county automobiles in making their inspection. In no instance would a commissioner be entitled to mileage and at the same time use a county-owned automobile in making his inspections or traveling to and from a meeting of the Commissioners Court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 26, 1941.

Hon. John Brandon,
Secretary of State,
State of Alabama,
CAPITOL.

Elections—"Independent" Candidates—Time of Filing Declaration of Candidacy and Petition of Electors in Special Election to Fill Congressional Vacancy Held in Year in which no State-wide Primary Election is Held—

1. A person desiring to become an "Independent" candidate in a special election to fill a Congressional vacancy held in a year in which no State-wide primary election is held does not have to file his declaration of candidacy and petition of electors with the Secretary of State on or before the First Tuesday in May, but may have his name printed upon the ballot to be used in such election, provided he files his declaration of candidacy and petition of electors with the Secretary of State at any time before the date on which he is required to certify the candidates in such election to the Judges of Probate of the various counties composing said Congressional district.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of March 7, 1941, is as follows:

"We have received an inquiry from a legal resident of one of the counties comprising the seventh congressional district, in which a special election will be held on June 24th to fill the vacancy in Congress occasioned by the resignation of W. W. Bankhead, inquiring as to the steps to be taken to become a candidate in said election, as an independent.

"Act No. 424 of the 1935 Acts refers only to state-wide primaries and general elections. Please advise if and when a candidate should comply with the provisions of this Act insofar as filing a declaration and petition of the names of three hundred qualified electors in the seventh congressional district requesting him to become such candidate."

Your request for official opinion involves a construction of Section 462 of the Code of Alabama, 1923, as last amended by Act No. 424, H. 805, approved September 13, 1935 (General Acts, 1935, page 894), which reads as follows:

"Section 462. (372) (1606) NAMES OF CANDIDATES PLACED ON BALLOTS; CERTIFICATE OF NOMINATION.—The probate judge of each county shall cause to be printed on the ballot to be used in their respective counties the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in their state, and certified in writing and filed with him not more than sixty days nor less than twenty days previous to the day of election. The certificate must contain the name of each person nomination and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election, and their signatures must be duly acknowledged by one or more of them before an officer authorized by law to take acknowledgements. The judge of probate shall also cause to be printed upon the ballots the name of any qualified elector who has been requested to be a candidate for any state, county, municipal or federal office by written petition signed, in case of a candidate for a state or federal office, by at least three hundred electors, and in case of a county or municipal office, by at least twenty-five electors qualified to vote in the election, to fill said office; when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide Primary Election is held. In case of a person to be voted for by the electors of the whole state or an entire congressional district or judicial circuit, the certificate of nomination or the petition must be filed in the office of the secretary of state before the first Tuesday in May in the year in which a state-wide Primary Election is held; and the secretary of state must thereupon immediately certify to the judge of probate of each county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated. In case of a person to be voted for by the electors of a senatorial district, the petition or certificate of nomination must be filed with the judge of probate of each county composing the senatorial district. Provided, however, that the judges of probate of the several counties in this state are hereby prohibited from causing to be printed upon the ballot to be used in their respective counties the name of any independent candidate for any state, county, or federal office who had not filed his or her declaration to become such a candidate before the first Tuesday in May in the year in which a state-wide primary election is held."

This Code Section, as last amended, supra, has previously been construed by this office in opinions to Hon. Howell Turner, Secretary of State, Capitol, under date of June 18, 1936 (Quarterly Report of Attorney General, Vol. III, page 178), and to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, Birmingham, Alabama, under date of August 4, 1936 (Quarterly Report of Attorney General, Vol. IV, page 107). One of the questions propounded to this office by Judge Hawkins was as follows:

> "Does said act (said Code Section, as last amended, supra) have any application to municipal elections held in a year in which no State-wide Primary Election is held?"

In the opinion to Judge Hawkins, supra, we answered that inquiry as follows:

> "My answer to the fourth inquiry is in the negative. As pointed out in my answer to your third inquiry, all regular municipal elections for cities and towns under the General law are held on the third Monday in September, 1936, and quadrennially thereafter and consequently are held in years in which state-wide primary elections are held, such state-wide primary elections being held in all even numbered years. Municipal elections held in years in which there is no state-wide primary election are held under special or local laws and are to be governed by the provisions of the same and not by the provisions of the general laws on the subject such as this Act. It is obvious that the Act here under consideration was not intended to apply to municipal elections held in years in which no state-wide primary election is held since the provisions of the Act in regard to filing all petitions and declarations of candidacy by candidates nominated by petition relate to the first Tuesday in May in the years in which state-wide primary elections are held, the first Tuesday in May being the time of the holding of the first statewide primary election in every even numbered year. This provision could not be effective in years in which no state-wide primary election is held."

On the basis of the same reasoning that caused this office to conclude that said Code Section, as last amended, supra, did not apply to municipal elections held in years in which no State-wide Primary Election is held, it is my opinion that said Code Section, as last amended, supra, insofar as the time of filing the petition of electors is concerned, that is, "before the first Tuesday in May in the year in which a State-wide Primary Election is held," does not apply to a special election to fill a vacancy in Congress held in a year in which no State-wide Primary Election is held.

In view of the above conclusion, it is my opinion that a person who desires to become an "independent" candidate in a Special Election to fill a vacancy in Congress held in a year in which no State-wide Primary Election is held may have his name printed upon the ballot to be used in such election, provided he files his declaration of candidacy and petition of electors with

you, as Secretary of State, at any time before the date on which you are required to certify the candidates in such election to the Judges of Probate of the various counties composing said Congressional District.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 26, 1941.

Hon. Joe C. McCorquodale,
Tax Collector,
Clarke County,
Grove Hill, Alabama.

Taxation—Corporate Stock—Lien for Taxes—Mortgages—

Where a domestic corporation made the return required under Section 13 of the Revenue Act of 1935 (General Acts, 1935, pp. 256, 268), omitting under Section 17 of said Act (General Acts, 1935, p. 271) to list the names of its shareholders, the corporation itself was primarily liable to pay the ad valorem tax assessed against such shares.

In such case the lien for State and County taxes assessed against the shares extends to each and every piece and parcel of the corporation's real and personal property, and may be enforced thereon by sale of such property or by suit in equity as against a mortgagee who foreclosed his mortgage and purchased the property thus subject to the lien for taxes. Revenue Act, 1935, Section 372.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated January 7, 1941, follows:

"A corporation known as Quality Earths, Inc., filed a tax assessment in Clarke County for the tax year 1940. This corporation was incorporated in Clarke County; its assessment showed real property assessed at a valuation of $2,860.00; machinery and personal property assessed at a valuation of $1750.00; and its shares of stock were valued for taxation at $11,880.00, so that there was a residue of share value, over and above tangible property values, of $7,270.00. During the calendar year 1940 Reconstruction Finance Corporation, which held a mortgage on all tangible property of Quality Earths, Inc., foreclosed its mortgage on the tangible property and bought the property at the foreclosure sale.

"The real estate and personal property assessed to Quality Earths has an aggregate assessed value of $4610.00, and the tax rate in Clark County is twenty-one mills, so that the total tax due on the tangible property is $96.81. On December 28, 1940, Reconstruction Finance Corporation sent me its voucher for $96.81, which is offered as payment in full of the real and personal property taxes assessed against the property of Quality Earths, Inc.; it is sent with the request that I accept it as full payment of all liability of Reconstruction Finance Corporation with respect to such taxes, Reconstruction Finance Corporation having acquired the property by foreclosure on July 30, 1940.

"I respectfully request that you let me have your opinion, as promptly as convenient, as to whether or not Reconstruction Finance Corporation is liable for the taxes on the shares of the corporate stock of Quality Earths, Inc., and whether I can sell the real and personal property, or either, which formerly belonged to Quality Earths, and which now belongs to Reconstruction Finance Corporation, for payment of the taxes assessed on the shares of corporate stock in Quality Earths."

Under Section 13 of the Revenue Act of 1935 (General Acts, 1935, p. 256, at p. 268), shares of the capital stock of domestic corporations are subject to assessment for State and County ad valorem taxes, to the same extent as other personal property. Specific provision is made for determining the assessed value of such shares, and for assessment thereof in the name of the corporation itself, "if a corporation by endorsement on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders." (Section 17, General Acts, 1935, page 271).

Section 372 of said Revenue Act, supra (General Acts, 1935, p. 566), so far as pertinent, reads as follows:

"From and after the first day of October of each year * * * the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him * * * which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it, * * * These liens shall be superior to all other liens * * * and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act, or as other liens upon property are enforced." (Emphasis supplied)

From your statement of facts, it appears that on and after October 1, 1939, the property of the taxpayer, Quality Earths, Inc., was subject to the lien of state and county taxes for the tax year 1940, and that the mortgagee foreclosed its mortgage on July 30, 1940.

This foreclosure did not in anywise affect the tax lien, which extended to **"each and every piece or parcel"** of the mortgagor's property, and was superior to the lien of the mortgagee, as above declared by the statute, and can be enforced by sale of the property, although it may now be owned or held by the Reconstruction Finance Corporation. That corporation is not, however, personally "liable for the taxes" in the sense that an action would lie against

it for their recovery. But it should be made a party to any suit that might be filed to enforce the lien. Also, the sale may be had under regular statutory procedure as in the case of sale of real estate for unpaid taxes.

In **Brantley v. Kelly,** 226 Ala. 47, 145 So. 649, it was held that if a corporation in its return required to be filed with the Tax Assessor and the State Tax Commission for assessment of the shares of its capital stock under the Revenue Code of 1929 failed to list the names of its shareholders, the corporation itself was primarily liable for the taxes on said shares as well as the tax on its tangible property.

Said the Court:

> "The appellant's main point, as presented by brief, is that the corporation was not liable for any tax except upon the real and personal property owned by it and not for the stock of the individuals who were personally liable for the tax and there was no legal duty upon the corporation to pay same—that section 26 of the Revenue Code requires the stock to be assessed against the stockholders and he shall be liable for the tax, and notwithstanding said section provides that the corporation 'shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation,' that this is intended as a mere matter of convenience and fixed no legal liability on the corporation for the tax on the stock. This question might be involved had the corporation assessed the stock to the shareholder and complied with section 26 as to the listing of same, etc., as there required, though we do not mean to hold that the corporation would not be liable even if this had been done. This question may be pretermitted for the reason that the corporation did not comply with or avail itself of section 26 in the assessment of the stock, but omitted to furnish a list of the shareholders and availed itself of section 29 which permits the omission of the stockholders in the event the corporation agrees to pay the tax, and which was done in the assessment. Therefore, the corporation became primarily liable for the tax both as to the stock as well as the property."

It was also held in that case that a tax collector who had failed to collect the tax on the shares of corporate stock and was, therefore, upon final settlement charged therewith, might maintain a bill in equity to enforce the State's lien on the real estate of the corporation for the tax on the shares, being subrogated to the State's lien aforesaid and having also the statutory right so to reimburse himself, as against a mortgagee who had foreclosed his mortgage lien and owned the property, with notice of the tax lien.

I am advised by the State Department of Revenue that the taxpayer, Quality Earths, Inc., did not list the names of its shareholders and agreed to pay the tax on said shares as provided by Section 17 of the Revenue Act of 1935, supra. **Brantley v. Kelly,** supra, holds that in such case the taxpayer corporation is "primarily liable for the tax both as to the stock as well as the property."

In that case the decision was based upon Sections 26 and 29 of the Revenue Code (compilation) of 1929. The verbiage of said Section 26 varies somewhat from that of Section 13 of the Revenue Act of 1935, now in effect, whereby provision exists for assessment of the shares, but the provision of Section 29 of said Revenue Code (compilation) of 1929, so far as pertinent to the present discussion, is the same as those of Section 17 of the latter act, to wit:

> "If a corporation by endorsement on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders." (General Acts, 1935, page 271, Sec. 17).

Likewise, Section 372 of the Revenue Act of 1935, supra, declaring the lien of taxes and the superiority thereof over other liens, was brought forward from Section 381 of the Revenue Code (compilation) of 1929 (General Acts, 1919, p. 282, Sec. 416), and is identical therewith.

In view of this substantial identity of law in effect when the **Brantley-Kelly** case was decided with the provisions of law as the same subject matter at this time, that case is decisive authority to the effect that the property of Quality Earths, Inc., both real and personal, is now subject to sale for the lien of taxes assessable against its shareholders for the tax year 1940, as provided by Section 13 of the Revenue Act of 1935, supra, and that said lien is superior to the mortgage lien of Reconstruction Finance Corporation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 28, 1941.

Hon. John S. Pollard,
Tax Assessor, Dallas County,
Selma, Alabama.

Exemptions—Property owned by Masonic Temple Association of Selma, Alabama, and let for rent or hire, is not exempt from ad valorem taxation, even though income from said property is used for charitable purposes (General Acts, 1935, page 257).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of March 24, 1941, is as follows:

"The Masonic Temple Association of Selma, Alabama, made a lease agreement through its duly authorized representative, Mr. J. C. P. Heinz, Chairman of the Board of Trustees, lessor and the Gulf Refining Company, a corporation as lessee.

"The Lessor owned a lot in the City of Selma on which they agreed to construct a building with drive ways and street privileges. The contract stated that it contemplated that the lessor would not expend in excess of $8,000.00 for building, driveways, etc. referred to in the contract, further states that the lessor agrees to pay all taxes upon the land and lots thereon and further agrees to keep up the buildings and improvements during the term of the lease or extension thereof. The lessee agrees to pay to the lessor a rental of $115.00 per month for a period of ten years.

"The Masonic Temple Association of Selma, Alabama, claims that it is a charitable organization and through some law now on the statutes, it is exempt from the payment of ad valorem tax. Please give me your official opinion at the earliest possible moment, so that your ruling can be presented to the Dallas County Board of Equalization before it adjourns."

It is my opinion that the property of Masonic Temple Association of Selma is not exempt from ad valorem taxes. An examination into the character of the Association reveals that it is not a subordinate lodge of the Grand Lodge, A. F. and A. M., but is rather a corporation formed for the purpose of acquiring and maintaining a Masonic Temple in the City of Selma for the joint use and benefit of two subordinate A. F. and A. M. lodges, and two other Masonic Lodges not subordinate to the Grand Lodge, A. F. and A. M. It appears that the particular piece of property concerning which you inquire was acquired in the name of the Masonic Temple Association of Selma, Alabama, rather than in the name of any subordinate lodge of the Grand Lodge. Of consequence, the case of **Ware Lodge No. 435, etc. v. Harper,** 236 Ala. 334, 182 So. 59, 63, in which it was held that property owned by a subordinate lodge of the Grand Lodge was exempt from ad valorem tax, is not applicable, since, from its character above set out, this Association could not be considered a subordinate lodge.

It will be noted that the Ware Lodge case turned on the proposition that the exemption from taxation in the charter of the corporation was a part of the contract between the corporation and the State, and, therefore, inviolate as a contractual obligation. No such finding can be made with respect to the corporation concerning which you inquire. Accordingly, the property of the Masonic Temple Association of Selma, Alabama, being let for rent or hire, would not be exempt from taxation, even though the income from the property be used for charitable or benevolent purposes.

Your attention in this regard is directed to Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 257), which provides as pertinent as follows:

"Section 2. * * * * All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; pro-

vided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use of business purposes, **shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes;** * * *" (Emphasis supplied)

Cf. Quarterly Report of Attorney General, Volume XVIII, page 171; Biennial Report of Attorney General, 1926-1928, page 249.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 28, 1941.

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Taxation—Tax sales—Fees—Officers—Probate Judge—Tax Collector—

The fee allowed in Section 239 of the 1935 Revenue Act should be taxed on the basis of each notice served.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of March 8, 1941, in which you request my official opinion as follows:

"Please give me an opinion on the following question:

"Section 239 of Revenue Code requires that Probate Judge receives 25c for 'each notice to delinquent property owner', and that the Tax Collector shall have 25c for each notice served.

"If a piece of property is assessed to several parties, and Probate Judge makes a notice for each party, is he entitled to one 25c fee, or 25c fee for each notice; also, is the Tax Collector entitled to only one 25c fee for serving the notices, or to a 25c fee for each notice served?

"Please let me hear from you on this matter as soon as possible, as I must begin charging the Probate Judge's fees next week."

The general rule in Alabama is that the statutory provisions of notice of tax sale must be strictly pursued when property is sold for taxes to make such a sale valid.

Morris vs. Mouchette, 199 So. 516.

Lane vs. Roma Lumber Company, 234 Ala. 551, 176 So. 283,

Johnson vs. Harper, 107 Ala. 706, 18 So. 198.

While the application of a statute in particular may appear burdensome, the sale of property for taxes, to be valid, must be held in strict compliance therewith.

Section 239 of the 1935 Revenue Code (General Acts 1935, p. 359) reads as follows:

> "Section 239. For each notice to a delinquent property owner to show cause why a decree of sale should not be rendered, the Judge of Probate is entitled to a fee of twenty-five cents and for each decree of sale, twenty-five cents; the Tax Collector shall have twenty-five cents for serving each notice which may be given by registered mail with return receipt demanded, but for his attendance at court, he shall receive no pay, but in case of appeal, the sheriff and the clerk of the appellate court shall be entitled to the same fees as for services in like cases."

The basis of the fees allowed the Judge of Probate and the Tax Collector is "for each notice". In my opinion the respective officers should tax the fee for each notice regardless of how many parties of interest there may be as to any assessment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 28, 1941.

Hon. J. S. Benson, Chairman,
Commissioners Court,
Jackson County,
Scottsboro, Alabama.

Statutes—Constitutional Law—

1. Act creating Jackson County Court (Act No. 647, S. 379, approved July 10, 1940, Local Acts, 1939, page 368) held not to violate Sections 45, 62, 106 and 107 of the Alabama Constitution, 1901.

2. Sections 7 and 35 of Act No. 647, supra, construed.

3. Clerk of the Jackson County Court with the approval of the judge, authorized to purchase all necessary furnishings, records, stationery and supplies for the equipment and maintenance of said Court.

4. Monthly salary warrants of Judge of Jackson County and deputy solicitor of said Court issued by official who issues salary warrants of other county officers.

5. Supplies for Jackson County Court paid for out of County treasury upon warrants issued by Judge of said Court and signed by the clerk.

6. Clerk of Jackson County Court, with approval of the judge, vested with exclusive jurisdiction to purchase necessary furnishings, records, stationery and supplies for the equipment and maintenance of said Court.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion bearing date of January 21, 1941, follows:

"Our County Attorney has submitted his opinion that Local Act S. 379 (Jackson County Local Acts 1939, page 368) is unconstitutional and recommended that no funds be paid for the expense of said Jackson County Court until said Act's constitutionality is determined and suggests that we obtain your opinion thereon.

"Please refer to Local Acts 1939 pages 368-377, S. 379, and to the House Journal, pages 2366-2371-2945-3322-3358-3411, and to Senate Journal, pages 1321-1702-1882-2827-2893-2899, and to the opinion and affidavit of our County Attorney, and advise me as follows:

"1. Is Local Act S. 379 for Jackson County (Local Acts 1939, page 368) constitutional?

"2. If said Act is constitutional, should the Commissioners Court approve for payment the necessary furnishings, fixtures, stationery, etc. under Section 7 of the Act, or shall the Clerk purchase said supplies with the approval of the Judge, under Section 35 of the Act.

"3. Does the Judge of Probate or the Judge of the County Court issue warrants for the payment of the Judge's Salary, the Solicitor's Salary, and for the supplies of said Court?

"4. Does the Commissioners Court have any authority or jurisdiction as to what supplies shall be purchased for said Court, or is that authority now vested in the Judge and Clerk of the Court?

"The Jackson County Court has called a session for February 3rd, 1941, and an early opinion will be appreciated.

"Of course, if the Act is ruled unconstitutional, there is no necessity to answer questions 2, 3 and 4."

The first question propounded by you is whether or not Act No. 647, S. 379, approved July 10, 1940 (Local Acts, 1939, page 368), is constitutional. This question is very broad, and therefore this opinion will be limited to a discussion of the constitutional objections raised to said act by the County Attorney of Jackson County, Alabama. The County Attorney in his brief contends that the said Act is unconstitutional in that it violates Sections 45, 62, 106 and 107 of the Constitution of Alabama, 1901.

At the outset, without going into minute detail, I wish to advise that in my opinion Act No. 647, S. 379, supra, was regularly, legally and constitutionally passed by both Houses of the Alabama Legislature and approved by the Governor. I do deem it advisable, however, to point out that contrary to the County Attorney's contention, the House Journal shows (page 2371) that the said bill was referred to the Standing Committee of the House on Local Legislation No. 1, and, further, that the said House Journal (page 2945) shows that Mr. Hall, Chairman of the Standing Committee on Local Legislation No. 1, reported that said committee, in session, had acted favorably on and ordered returned to the House, several bills among which was the Act (S. 379) in question.

Further, I would like to point out that there is no merit in the contention that Act No. 647, supra, is unconstitutional for that the notice of the said Act was not published once a week for four successive weeks in some newspaper published in Jackson County, Alabama. While it may be true, as contended, that the said notice was actually published only three times, yet the Journals of each House affirmatively show that the notice and proof required by Section 106 of the Constitution was given, and, therefore, as many times held by our Supreme Court, I cannot go behind the Journals, but must be governed by them. **Ex parte Kelly,** 153 Ala. 668, 45 So. 290; **Sellers v. State,** 162 Ala. 35, 50 So. 340; **State ex rel. Frederick, et al. v. Brodie,** 148 Ala. 381, 41 So. 180; **Byrd v. State,** 212 Ala. 266, 102 So. 223; **Tucker v. State,** 231 Ala. 350, 165 So. 249. Also, the proof of the publication of the notice to apply to the Legislature for the passage of Act No. 647, supra, was sufficient. **Ex parte Black,** 144 Ala. 1, 40 So. 133.

The first question of merit presented by the able County Attorney in his brief is whether or not Act No. 647, supra, violates Section 45 of the Alabama Constitution, 1901. It is insisted that the body of the said Act is broader than its title, in that it contains two subjects not germane or cognate to the said title; namely, the provision abolishing the former County Court and the provision relative to the general fine and forfeiture fund of the county.

Section 45 of the Constitution of Alabama, 1901, is as follows:

"The style of the laws of this State shall be: Be it enacted by the Legislature of Alabama, which need not be repeated, but the act shall be divided into sections for convenience, according to substance; and the sections designated merely by figures. Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as it revived, amended, extended, or conferred, shall be reenacted and published at length."

Our Supreme Court, in the case of **Norvell v. State**, 143 Ala. 561, in passing upon the constitutionality of an act which created the Walker County Law and Equity Court, held as follows:

"Counsel for appellee in argument say, 'There is another provision in the original act, (that is, the act of Dec. 5th, 1900) which is clearly unconstitutional. Section 7 abolished the county court and vested original jurisdiction of all misdemeanors in the Law and Equity Court. There was no intimation of this legislation.

"Section 7 of said act provides as follows: 'That the court hereby created shall have the exclusive jurisdiction of all cases now triable by the county court of Walker County, and that the county court of Walker county as now constituted, be and the same is hereby abolished,' etc. There can be no doubt, it seems to us, that the conferring of exclusive jurisdiction, on the court created by the act, of all cases theretofore triable in the county court of Walker county, was a matter germane to the subject expressed in the title of the act, 'To establish the Walker County Law and Equity Court.' The provision abolishing the county court was nothing more in effect, than had already been done by taking away all jurisdiction of that court and conferring the same on the Law and Equity Court created by the act. Moreover, if the provision abolishing the county court could be said to be a matter not referable to or embraced in the subject expressed in the title of the act, and for that reason offensive to the Constitution, still, under the well settled rules of construction, the objectional part would be eliminated, and the rest be allowed to stand, when, as in the present case, the remaining parts would constitute a complete enactment within the subject expressed in the title."

From a reading of Act No. 647, supra, in its entirety, there can be no doubt that the court created thereby had conferred upon it exclusive jurisdiction of all cases theretofore triable in the County Court of Jackson County, Alabama, and, therefore, in view of holding in the case of **Norvell v. State**, supra, the provision in said Act abolishing the County Court of Jackson County, Alabama, was a matter germane to the subject expressed in the title of the said Act. In other words "the provision abolishing the County Court was nothing more in effect, than what had already been done by taking

away all jurisdiction of that court and conferring the same on the Law and Equity Court (here the Jackson County Court) created by the Act."

In this connection, see, also, 59 C. J., page 804, where the following rule is laid down:

> "A statute is not rendered void for multifariousness, under a Constitutional provision prohibiting an Act from embracing more than one subject or object, by the fact that it enacts new law and also expressly amends a prior statute on the same subject, or by the fact that it amends a prior statute in two or more particulars. The scope or provision of a statute may be enlarged by amendment, without violating the Constitutional prohibition, provided the added matter is germane to and not outside the purview of the original Act."

See, further, 59 C. J., page 816, wherein the author states the rule thusly:

> "An Act may incorporate a provision for the repeal of an inconsistent prior statute, or statute on the same subject, although such repeal is not indicated or referred to in the title, without violating a Constitutional requirement that the subject of an Act be expressed in its title, since an intention to repeal all laws inconsistent with the new measure is necessarily implied, and so need not be expressed in the title."

The provision relative to the General Fine and Forfeiture Funds of the county is found in Section 25 of Act No. 647, supra. This section is as follows:

> "Section 25. Only claims accruing in the Jackson County Court will be claims against said fund, and all claims now registered against the General Fine and Forfeiture Fund that originated in the Jackson County Court be re-registered against said Fund within six months after the passage and approval of this Act, else they will be barred against said fund, and such claims must be paid in the order in which they are registered."

I do deem it advisable before proceeding further to set out Section 24 of Act No. 647, supra, which, when read in connection with Section 25, supra, gives the full picture and shows the purpose for Section 25, supra, and the extent to which the General Fine and Forfeiture Fund of the County was affected. Section 24, supra, is as follows:

> "Section 24. That there is hereby created a Fine and Forfeiture Fund for the Jackson County Court of Jackson County, Alabama, to be known as the Jackson County Court Fine and Forfeiture Fund; and that, from and after the passage of this Act all fines and forfeitures assessed and collected in said Court shall be deposited in said Fine and Forfeiture Fund of Jackson County Court."

After a careful search, I have been unable to find a case on all fours with the proposition here presented, that is, whether or not Section 25, supra,

is an independent subject and thus not germane to the title of Act No. 647, supra. I am of the opinion, however, after a careful consideration of the purpose and effect of Section 25, supra, and the many cases dealing with this subject, that this particular provision is not an independent subject, but is incident to the main object of the Act, and, therefore, germane to its title. See **Cadle v. Bland,** 213 Ala. 665, 106 So. 170; **Jackson v. Sherrod,** 207 Ala. 245, 92 So. 481; **Hails v. State,** 16 Ala. App. 132, 75 So. 724; **Heck v. Hall,** 238 Ala. 274, 190 So. 280; **England v. State,** 197 So. 369.

In **Marion v. Underwood,** 231 Ala. 225, 164 So. 296, it was said:

"And when the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it or which results as a compliment of the thought contained in the general expression, is included in and authorized by it, Citing Gibson vs. State, supra."

In **James v. State,** 26 Ala. App. 295, 107 So. 727, it was said:

"Appellant insists that the Act is duplicitous; that the creation of the Law and Equity Court, the abolishment of the County Court, and the abolishment of the office of deputy solicitor are separate and distinct subjects of legislation. In answering this contention, we deem it sufficient to say that these provisions are but incident to the main object, that all its provisions are allied, germane, and cognate to it, and that Section 45 of the Constitution is satisfied."

In **Heck v. Hall,** supra, it was said:

"A statute has but one subject, no matter how many different matters it relates to, or deals with, if they are all cognate, and are but different branches of the same subject. Yeilding et al. v. State ex rel. Wilkinson, 232 Ala. 292, 167 So. 580."

In view of the foregoing authorities and the conclusions heretofore expressed, it is my opinion that Act No. 647, supra, is not violative of Section 45 of the Constitution of Alabama, 1901.

It is next insisted by the County Attorney in his brief that Act No. 647, supra, violates Section 106 of the Constitution of Alabama, 1901. It is argued that the notice, as published, was insufficient for that no notice was given that the proposed Bill abolished the then existing County Court of Jackson County, Alabama, nor that it modified Local Acts of 1896-97, at page 870, which deal with the General Fine and Forfeiture Fund of the county.

The notice of the intention to apply for the passage of the act under consideration is as follows:

"NOTICE"

"Pursuant to constitutional requirement, notice is hereby given that bill will be introduced at the present or next special session of the Legislature of Alabama, for the purpose of establishing a county court of Jackson County, Alabama; to define its jurisdiction and powers; to provide for its officers, their powers and duties and compensations; to provide that said court shall be open at all times for the trial of cases and transaction of business; to provide the rules and procedure of said court; to provide a fine and forfeiture fund for said court; to provide for the transfer of certain causes now or hereafter pending in the Circuit Court, the County Court, and the Probate Court of Jackson County, Alabama, to the Jackson County court; to provide for the transfer of certain cases pending in said Jackson County Court to the equity side of the Circuit Court of Jackson County, Alabama, and an effort will be made to have the same enacted into law."

As stated in the case of **State ex rel. Wilkinson v. Allen,** 219 Ala. 591, 123 So. 36, Section 106 of the Constitution has been many times construed by our courts and four well-defined canons of construction have been firmly settled (see canons of construction therein set out). However, from my examination of many of these cases, I have reached the conclusion that the Supreme Court has not followed any hard and fast rule in applying these canons of construction, but has let each particular case rest upon its own bottom. It is impossible to reconcile the holdings in the various cases wherein Section 106 of the Constitution has been considered, and, therefore, adopting the apparent rule followed by the Supreme Court, I wish to advise that in my opinion the notice herein being considered was sufficient and does not offend Section 106 of the Constitution. The notice in question gave the nature of the proposed court, its jurisdiction and powers, and left to the Legislature to provide for the details (**Polytinsky v. Johnston,** 211 Ala. 99, 99 So. 839).

Lastly, it is argued by the County Attorney in his brief that Act No. 647, supra, violates Section 107 of the Constitution, 1901, in "that it modifies Local Acts, 1896-97, as to the Fine and Forfeiture Fund, without notice of such modification."

In this connection, I call your attention to the case of **Miller, Treasurer, v. Griffith,** 171 Ala. 337, 54 So. 650, wherein Mr. Justice Simpson, in delivering the opinion of the Court, said:

"Section 106 of the Constitution provides that no special, private, or local law shall be passed, unless notice is first given, etc., 'which notice shall state the substance of the proposed law.' Section 107 provides that 'the Legislature shall not, by a special, private or local law, repeal or modify any special, private or local law except upon notice being given and shown as provided in the last preceding section.' The notice required in the preceding section is distinctly stated to be **'the substance of the proposed law,' and, as this section requires the same notice, it is difficult to see how the wording of the Constitution can be construed to mean anything else.** (Emphasis supplied)

In view of the conclusion heretofore reached that the notice given of the Act in question did not violate Section 106 of the Constitution, and applying the rule laid down in the case of **Miller, Treasurer, v. Griffith,** supra, it is my opinion that said Act is not violative of Section 107 of the Constitution. It is, therefore, my opinion, and I so advise you, that Act No. 647, supra, is constitutional.

In answer to your second inquiry, attention is called to Sections 7 and 35 of Act No. 647, supra, which are as follows:

> "Section 7. That said court shall be held at the court house of Jackson County, and that said court shall be open at all times for the trial of cases and transaction of business. In case of sickness or disqualification of the judge of said court, the law applicable to the appointment and service of special judges in the Circuit Courts shall apply. The judges of said court shall be subject to the same penalties for failure to attend upon the Court as are Circuit Judges of this state. **The judge of said court shall keep an office in the courthouse of Jackson County, and it shall be the duty of the Court of County Commissioners of Jackson County to provide such office, and supply the same with the necessary furnishings, fixtures, stationery, etc."** (Emphasis supplied)

> "Section 35. That the clerk, with the approval of the judge of said court, is hereby authorized to purchase all necessary furnishings, records, stationery and supplies for the equipment and maintenance of said Court, and the same shall be paid out of the county treasury upon warrants drawn by the judge and signed by the clerk."

It will be noted that Section 7, supra, provides that the Judge of the said court shall maintain an office in the courthouse of Jackson County, Alabama, and that it shall be the duty of the County Commissioners to provide **such office** for the judge and to supply the same with the necessary furnishings, fixtures, stationery, etc. Section 35, supra, however, provides that it shall be the duty of the clerk of the said County Court, with the approval of the judge, to purchase all necessary furnishings, records, stationery and supplies for the equipment and maintenance of the said **Court.** It will, therefore, be seen that Sections 7 and 35, supra, deal with, and refer to, entirely different subjects. To reiterate, the duty is imposed upon the Commissioners Court to provide an office for the judge of the County Court, and to supply the same with the necessary furnishings, fixtures, stationery, etc., while the duty is imposed upon the clerk of said Court, with the approval of the judge, to purchase all necessary furnishings, records, stationery and supplies for the equipment and maintenance of the Jackson County **Court.**

Your third inquiry presents three questions; namely, (a) does the Judge of Probate or the Judge of the County Court issue warrants for the payment of the Judge's salary, (b) does the Judge of Probate or the Judge of the County Court issue warrants for the payment of the Solicitor's salary, and (c) does the Judge of Probate or the Judge of the County Court issue warrants for the payment of the supplies of said court.

In my opinion, the answer to questions (a) and (b), supra, are the same, and, therefore, I will treat them together.

Sections 5 and 6 of Act No. 647, supra, are respectively as follows:

"Section 5. That the judge of said court shall receive a salary of three thousand dollars per annum, payable in equal monthly installments out of the county treasury at the end of each month, his signed receipt being required."

"Section 6. That the deputy solicitor appointed or elected for Jackson County Circuit Court shall represent the state in all criminal cases in said court, as ex-officio solicitor of the Jackson County Court, and shall receive a salary of fifteen hundred dollars per annum, payable in equal monthly installments out of the county treasury at the end of each month, his signed receipt being required, and said salary or compensation shall be in lieu of all other salary or compensation now provided by law for said deputy solicitor for said county."

It will be noted that the judge of the Jackson County Court and deputy solicitor of said court have a fixed annual salary which is payable in equal monthly installments out of the county treasury. It will further be noted that both Section 5 and Section 6, supra, contain the phrase "his signed receipt being required." These sections, other than the phrase "his signed receipt being required," are silent as to what official should issue the warrants for the payment of the salaries of these two officers. This being true, it is my opinion that the "County Financial Control Act" (General Acts, 1935, p. 803) would control. This office, in an opinion to Hon. J. R. White, Board of Revenue, Walker County, Jasper, Alabama (Quarterly Reports of the Attorney General, Vol. VI, page 57), in construing Section 5 of the "County Financial Control Act," held as follows:

"It will be noted from the above (referring to Section 5 of said act) that warrants can be drawn by only the Judge of Probate or Chairman of the Board of Revenue or other like governing body, or such officers as may be designated by such Board. The language of this Section is in the alternative and not in the conjunctive. In my opinion only one officer of the county may draw warrants against the General Fund of the County. This officer may be the Judge of Probate or the Chairman of the Board of Revenue or other like governing body, or such other officer as may be designated by such Board. To hold otherwise would nullify the purpose of the statute which allows one party to be constantly familiar with the financial status of the General Fund by knowing the exact number of warrants drawn against said fund. In cases where the claims do not have to be approved by the Board, the officer who was heretofore authorized to issue warrants must now issue orders for warrants which must be presented to the one officer authorized to issue warrants against the General Fund payable out of the County Treasury or County Depository (Quarterly Report of the Attorney General, Vol. I, p. 46)."

It therefore follows, and is my opinion, that the warrants for the payment of the salaries of the judge of the Jackson County Court and the deputy

solicitor for the said court should be issued by the officer of Jackson County, Alabama, who now issues warrants for the payment of the salaries of other county officials.

I do feel, however, that effect must be given to the phrase "his signed receipt being required," as it appears in Section 5 and 6, supra. Therefore, this is to advise that in my opinion the judge of the Jackson County Court and the deputy solicitor of said court must, upon receipt of their warrants each month, give signed receipts to the County Treasurer or other custodian of the county funds, as the case may be.

In answer to question (c), supra, it is my opinion that Section 35 of said act, supra, governs. Section 35, supra, provides that "all necessary furnishings, records, stationery and supplies for the equipment and maintenance of said Court" shall be paid for out of the county treasury **upon warrants drawn by the judge and signed by the clerk.**

In answer to your fourth inquiry, I again wish to call your attention to Section 35, supra, of said act. In view of this section, it is my opinion that in the Clerk of the Jackson County Court is vested, with the approval of the judge, the exclusive furnishings, records, stationery and supplies for the equipment and maintenance of said Court, and to purchase the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1941.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools and School Districts—Teachers—Statutes—

A teacher reemployed under the provisions of Section 10 of Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759), generally referred to as the Teacher Tenure Act, held entitled to be paid the same salary for the succeeding school year, which he received during the previous school year; unless, because of the condition of the revenues in the school system in which such teacher is employed, there is a general reduction in the salary schedule or a general reduction in the salary schedule or a general shortening of the terms in the county, or vice versa; in which event such teacher's salary for the succeeding school year will be affected accordingly.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion under date of December 20, 1940, is as follows:

"Your opinion is requested on the following:

"Section 10 of Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759), generally referred to as the Teacher Tenure Act, reads as follows:

"'Any teacher in the public schools, whether in continuing service status or not, shall be deemed re-employed for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; provided, however, that in no case shall such notice be given the teacher later than the first day of May of the termination of such employment, and such teacher shall be presumed to have accepted such employment unless he or she shall notify the employing board of education in writing to the contrary on or before the first day of June.'

"Do the words 'at the same salary' mean at the same monthly salary as the previous year or the same annual salary?

"In construing this question, your attention is called to Section 4 of Act No. 499, supra. This section refers to a minimum salary schedule which may be adopted by the State Board of Education of Alabama for teachers in the public schools of the State. The minimum salary schedule adopted by the State Board of Education is a monthly minimum salary schedule rather than an annual minimum salary schedule.

"Your attention is also directed to Act No. 454 (H. B. No. 642), 1939 General Acts, commonly called the School Budget Act. This act requires boards of education to budget expenditures not in excess of budgeted income available for any year. The principal item in all school budgets is teachers' salaries. Boards of education usually are compelled to balance their budgets by regulating the length of the school term, provided that said term is not less than seven months."

The answer to your inquiry depends upon the meaning of the words "at the same salary" used in Section 10 of Act No. 499, S. 468, approved September 21, 1939 (General Acts, 1939, page 759), generally referred to as the Teacher Tenure Act, which said Section is quoted in your letter of inquiry.

In attempting to arrive at the proper answer to this inquiry, I shall be ever mindful of the purpose which gave rise to the enactment of this statute. In an opinion rendered to you under date of August 30, 1940 (Quarterly Report of Attorney General, Vol. XX, page 221), which opinion construed other phases of the Teacher Tenure Act, I concluded as follows:

"In arriving at these answers, I have been ever mindful of the fundamental and basic purpose of the act, which is to provide a system of security of employment for the teachers in the public school system of this state, and, in accordance with the well-known canon of statutory construction, I have construed the act in the light of this purpose."

In the case of **Board of Education of Marshall County v. Grady Baugh, et als,** 199 So. 822, decided on January 16, 1941, which sustained the holding of the opinion to you, supra, insofar as the question there dealt with was concerned, the Supreme Court, speaking through Mr. Chief Justice Gardner, stated:

"The very laudable purpose of this Act was to insure to the teachers some measure of security in their important work and to free them, at least to a measurable extent from the 'vicissitudes of politics' or the likes or dislikes of those charged with the administration of school affairs.

"Such being the manifest purpose of the Act it should be liberally construed in favor of the teachers, who constitute the class designated to be its primary beneficiaries. **Andrews v. Union Parish School Board,** 184 So. 574; **State, ex rel, Bass v. Vernon Parish School Board,** 194 So. 74; **State, ex rel, Kennington v. Red River Parish School Board,** 193 So. 225."

Of necessity, in arriving at the answer to your inquiry, I must consider the other provisions of the Teacher Tenure Act, and particularly Sections 4 and 5 thereof, which read as follows:

"Section 4: The salary or compensation of any teacher on continuing service status may be changed for any succeeding year to accord with a general salary schedule adopted by the employing board of education; provided, however, that no salary schedule shall operate to compensate teachers in less sums than the sums contained in a minimum salary schedule, which may be adopted by the State Board of Education of Alabama for teachers in the public schools of the State.

"Section 5: Any teacher on continuing service status, upon the recommendation of the superintendent, may be transferred for any succeeding year from one position, school, or grade to another without loss of status or violation of contract."

Act No. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610), which is generally referred to as the School Budget Act, and which has the effect of requiring the various county and city school systems of the State of Alabama to live within their respective annual incomes must also be considered.

Since the question before me is one of first impression in this State, I think the case of **State Ex rel. Bass v. Vernon Parish School Board,** 194 So. 74 (La. App.), which involved a similar question which arose under the Teacher Tenure Law of that State, is applicable to the instant inquiry. The Teacher Tenure Law of the State of Louisiana is similar to Act No. 499, supra. A

teacher who had a permanent status in the Vernon Parish, under the provisions of that law, had been employed as a Principal in a high school at a salary of $175 per month, but for the new school year was transferred by the parish school board to a grade school at a salary of $100 per month. He refused the new assignment and instituted proceedings to compel the parish school board to reemploy him for the full school session of the new year at the identical salary which had been paid him during the previous year. In holding that he was entitled to be so reemployed, the Court of Appeals of Louisiana spoke in pertinent part as follows:

"It is clear, under the admitted facts in this case and the provisions of the statute quoted, that plaintiff was a permanent teacher of the parish, and that had the school board discharged him as a teacher in the parish in the same manner in which he was demoted, he would be entitled to reinstatement, and, further, such reinstatement would be at the salary he was earning at the time of his discharge. It is apparent, then, that the lower court (though no written reasons are assigned for the judgment below) did not consider that the reduction or demotion of plaintiff from a teaching position paying $175 per month to another teaching position paying $100 per month amounted to being 'removed from office', which conclusion, if correct, places the plaintiff in a worse position than had he been arbitrarily denied employment of any sort as a teacher.

"We therefore have grave doubts that the Legislature intended the words 'removed from office' to mean only deprivation of employment as a school teacher in the parish, and feel that we should determine the true meaning of the law by considering the reason and spirit which caused its confection and induced the Legislature to enact it. See Article 18, Civil Code.

* * * * * *

"To hold that the Tenure Act merely guaranteed employment in the teaching profession in the parish would mean, not only that a teacher could be reduced in salary at will by the school board, even from the highest to the lowest salaried position, but also that a teacher could by arbitrary action of the school board be changed from teaching a subject or subjects in which he had specialized for years to the teaching of some entirely unrelated subject or subjects in which he might not even be qualified; and his removal from office could thus be effected indirectly when it admittedly could not be effected directly.

"From these considerations, we are of the opinion that the word 'office' as used in the statute refers not merely to a teaching position in the parish but to the particular type of teaching position or status which the teacher has attained, though not to the identical position, and that the disturbance of the teacher from that attained position or status is a removal from office under the statute.

"In view of that conclusion, and since it is clearly admitted in the case at bar that the plaintiff was demoted, and hence disturbed from his

position or removed from office, arbitrarily and without charges being made or hearing had, we are of the opinion that the judgment below sustaining the exception should be reversed, and that there should now be judgment granting the writ of mandamus prayed for, commanding the Vernon Parish School Board to employ the plaintiff at a salary of $175 per month for the full school term of 1939-1940, and to pay him all back salary due and exigible, and to reinstate him as a regular and permanent teacher in the Parish of Vernon according to his certificate and grade, and it is so ordered." (Emphasis supplied)

Of course, Section 5, supra, provides for the transfer of a teacher for a succeeding school year from one position, school or grade to another, without loss of status or violation of contract.

Construing the Teacher Tenure Act in the light in which it must be construed, as pointed out above, taking into consideration the other statutory provisions which must be considered, also pointed out above, and on the authority of the Louisiana case cited and quoted from, supra, I think your specific inquiry should be answered as follows:

When a teacher is reemployed under the provisions of Section 10, supra, he may subsequently, by proper procedure (See Section 5, supra, and the opinion to you, supra), be transferred to another position in the school system in which he is reemployed, or may be retained in the same position. In either event, he is entitled to the same salary which he received during the preceding school year, that is, the same monthly salary for the same number of months; unless, due to the condition of the revenues of the school system in which he is employed, there is a general reduction in the salary schedule, or a general shortening of the terms of the schools in the system, or vice versa, in which event his salary will be affected accordingly. To be specific: If a teacher was employed in a school system last year at a salary of $145 per month, and the school in which he was employed had an eight months' term, and he is reemployed under the provisions of Section 10, supra, he would be entitled to a salary this year in the amount of $145 per month for eight months, whether he was assigned to the same position or school, or subsequently transferred to another position or school, and regardless of the length of the term of the school this year to which he was assigned; unless, due to the condition of the revenues in the system in which he is employed, there is a general reduction or increase in the salary schedule, or a general shortening or lengthening of the school term in the system, as the case might be. If, due to the condition of the revenues of the system in which he is employed, there is a general salary reduction which reduces the salary for a teacher with his training and experience to $125 per month, then he would be entitled to only $125 per month for the number of months which the school in which he was employed last year runs this year. Likewise, if, due to the condition of the revenues of the system in which he is employed, there is a general increase in the salary schedule which increases the salary for a teacher with his training and experience to $170 per month, then he would be entitled to $170 per month for the number of months which the school in which he was employed last year runs this year. Also, if, due to the condition of the revenues of the system in which he is employed, there is a general shortening of the school term in the system which results in the school in which he was employed last year having only a seven and one-half

month term this year, he would only be entitled to his same monthly salary for seven and one-half months. Likewise, if, due to the condition of the revenues of the system in which he is employed, there is a general lengthening of the school term in the system which results in the school in which he was employed last year having an eight and one-half months term this year, he would be entitled to his same monthly salary for eight and one-half months.

Just as was the case in regard to some of the inquiries dealt with in the opinion rendered to you, supra, this inquiry is exceedingly difficult of answer, and, just as I stated in the opinion to you, supra, in regard to some of the inquiries there considered, it must be admitted that the answer which I have given to this inquiry, is not entirely free from doubt. However, it represents by studied judgment, and, in accordance with the well-known canon of statutory construction, I have construed the act in the light of the purpose which prompted its passage by the Legislature.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1941.

Mr. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Memorial Hospital Building,
Montgomery, Alabama.

Milk Control Board—Licenses of Distributors—

1. All milk handled by a distributor must be computed in calculating the license to be paid.

2. The fact that milk handled by a distributor is to be delivered to a federal reservation has no effect on the use of that milk in the computation of the license of the distributor.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your letter of February 13, 1941, in which you request an official opinion, is as follows:

"We should like to have your opinion upon the following situation which has arisen under the Milk Control Act, No. 164 H. 118-Toomer,

Approved March 20, 1939, with Amendments thereto, Approved September 21, 1939:

"Section 2 of this act is as follows:

" 'Section 2—That Section II of said Act approved March 20, 1939, be and the same hereby is amended so as to read as follows: Section II. LICENSE FEES. All persons required by this act to be licensed shall pay a yearly license fee computed upon the following rates: Stores . . Two and One Half Dollars ($2.50) each per year. Any person operating two or more stores shall obtain a license for each store and pay a license fee of Two and One-Half Dollars ($2.50) per year on each store. Producers . . An amount equal to seventy-five cents for each cow in his dairy herd or herds, dry or milking, over two years old, provided that each person, firm or corporation who owns or operates two (2) cows or less shall be exempt from the payment of a license fee as a producer. For the purpose of determining the total amount of such producers fee, the Board shall calculate same upon the largest number of cows in each producer's herd or herds at any time during the license year, and in the event any producer acquires or uses additional cows, bringing his dairy herd or herds in excess of such largest number during the license year, he shall pay an additional fee of seventy-five cents for each additional cow. Producer-Distributor . . Where a producer-distributor buys milk in addition to that produced by him, he shall pay a license fee as a producer as provided above, and as a distributor on the amount of milk he buys, provided, however, that, in the event he purchases milk, only a part of the year, he shall pay a distributors license only on the quarters of a year in which he purchases milk, each quarter or part thereof to be at the rate of one quarter year license, as a distributor. Distributor . . Distributors who handle less than fifty gallons per day . . a license fee of Ten ($10.00) Dollars per year. Distributors who handle more than fifty gallons per day, but less than one hundred gallons per day . . a license fee of Twenty-five ($25.00) Dollars. Distributors who handle more than one hundred gallons per day, but less than five hundred gallons per day . . a license fee of Sixty-two Dollars and Fifty cents ($62.50). Distributors who handle more than five hundred gallons, but less than one thousand gallons per day . . a license fee of One Hundred Twenty-five ($125.00) Dollars. Distributors who handle more than one thousand, but less than three thousand gallons per day . . a license fee of Three Hundred ($300.00) Dollars per year. Distributors who handle more than three thousand gallons per day a license fee of Four Hundred ($400.00) Dollars per year. The Board may in its discretion reduce, but not increase, any of the above rates. This act shall not apply to a person who produces milk for his own use or for the use of his own household and who does not sell any milk produced by him, provided further that the exemption from the payment of a license herein provided for of a person owning or operating two (2) cows or less shall not exempt said person from complying with the provisions of this act or the orders of the Milk Control Board, regulating the price of milk in a milk shed where said person sells any of the milk produced by him from such cows.'

"The Calhoun County Creamery Company, Inc., a corporation of Anniston, Alabama, was, prior to the time it started providing milk for

the soldiers at Fort McClellan, Alabama, handling between 500 and 1000 gallons of milk per day as a distributor. Since January 1, 1941, this company has been furnishing milk to Fort McClellan under a contract which calls for the furnishing to the fort of approximately 1100 gallons per day. We are desirous of finding out whether this milk should be counted in computing the number of gallons handled per day by the company under the provisions of Section 2 of the act as set out above. This question has arisen due to the peculiar situation regarding the furnishing of milk generally to Fort McClellan as set out in the next paragraph.

"The milk furnished to Fort McClellan by the company under its contract is purchased in bulk from distributors in the Birmingham Milk Shed. This milk is handled separately by the company and is bottled and delivered to the fort by it. The State Milk Control Board does not claim or exercise jurisdiction on the sale of milk to Fort McClellan. It does not attempt to supervise or regulate the price of the milk sold or the competition on the bids submitted for furnishing the milk. It does, however, fix the price that the Calhoun County Creamery must pay for the milk it purchases, whether for sale in the Anniston Milk Shed or Fort McClellan. Also, all of this milk purchased in Birmingham for the purpose of supplying the fort has been counted in the total number of gallons handled by the Birmingham distributors for the purpose of determining what license they shall pay under Section 2 as set out above.

"The milk at Fort McClellan is purchased on bids which may be asked for monthly or quarterly, depending upon the desire of the purchasing agent for the fort. Also, in the Anniston Milk Shed, which operates under the State Milk Control Board, a deposit on bottles is required but since no jurisdiction is claimed over the sale or distribution of milk at Fort McClellan, it is impossible to provide protection from bottle loss as a result of the milk sale and distribution at the fort.

"The Calhoun County Creamery Company maintains that, since all of the milk purchased from the Birmingham distributors goes directly to the fort under a contract over which the State Milk Control Board has no jurisdiction and since this milk has already been counted in computing the license to be paid by the Birmingham distributors and for the other special distinctions as set out above which distinguish the handling of this milk from the handling of the other milk which is normally handled by the Calhoun County Creamery Company, the Milk obtained from the Birmingham distributors should not be counted in computing the license to be paid by it under Section 2 of the act as set out above. This Board, as well as the Calhoun County Creamery Company, desires to know the correct status of this matter and we will thank you to give us your opinion as to what license the Calhoun County Creamery Company should pay under the circumstances set out above."

As I understand the facts presented in your inquiry, the Calhoun County Creamery Company, Inc., purchases milk in bulk from distributors in the Birmingham Milk Shed. They then bottle, cap and deliver this milk under contract to Fort McClellan. Your inquiry is whether or not this milk

furnished to Fort McClellan should be included with other milk handled by the Calhoun County Creamery Company in determining the amount of its license.

The authority of the Milk Control Board to include the milk sold to Fort McClellan in its calculation of the amount of the license to be paid by the Calhoun County Creamery Company may be challenged on two grounds. First, that the milk has already been included for license purposes in ascertaining the license to be paid by the Birmingham distributor, and secondly, that the milk is sold under a federal contract on a military reservation.

It is my opinion that neither of these grounds for challenge is well founded.

Under the facts presented in your inquiry, it appears that the Calhoun County Creamery Company is a "distributor" within the meaning of Section 2 of the Milk Control Act, as amended (Act No. 164, H. 118, approved March 20, 1939, General Acts, 1939, page 267, as amended by Act No. 553 S. 346, approved September 21, 1939, General Acts, 1939 page 873) which reads in pertinent part as follows:

> " * * * * 'Distributor' means a person who purchases accepts or receives milk for the purpose of putting such milk in bottles or other unit containers in which same is designed to be sold or for the purpose of cooling, pasteuring, standardizing or otherwise processing such milk for fluid milk consumption or **who buys milk from another producer, producer-distributor or distributor for the purpose of selling, jobbing or distributing** such milk at wholesale or retail for any one or more such purposes." (Emphasis supplied)

The license levied under Section II, as amended, is on the business and is determined by the amount of milk handled. The mere fact that the milk when handled by some other distributor has been used in calculating that distributor's license can have no effect on the use of the milk in calculating a subsequent dealer's license. **Brown Plumbing and Heating Co. v. McDowell,** 200 So. 104, 6th Div. 741 (MS) (Sup. Ct.) Cf. **Ten Eyck v. Eastern Farm Products,** 290 N. Y. Sup. 475, 160 Misc. 402, affirmed 292 N. Y. Sup. 787, 249 App. Div. 891. To construe otherwise would be to exempt all distributors purchasing from other distributors from the payment of a license. License fees of milk distributors are determined wholly upon the basis of the number of gallons of milk handled by distributors per day, regardless of the source or destination of the milk. Cf. opinion rendered to you on October 28, 1938, Quarterly Report of Attorney General, Volume XIII, page 49.

Therefore, it is my opinion that ground number 1, supra, is without sound basis.

The second ground, supra, presents a more difficult question. This Federal question involves two aspects; first, that of physical jurisdiction and, second, that of whether or not there is an unconstitutional burden placed upon the Federal Government.

I have held that the Milk Control Board could not regulate the prices to be charged for milk sold at Fort McClellan. Quarterly Report of Attorney General, Volume XVI, page 158. It will be noted that in this opinion, the offer was made on the reservation, the acceptance was made on the reservation, and the milk was delivered on the reservation. The basis for the holding in that opinion was that "at no time has any phase of the contract or its execution come within the jurisdiction of the Board." Therefore, the sale price could not be regulated by the Board.

In the above opinion, all the elements of the transaction to be regulated took place outside the jurisdiction of the Board. The situation here is not similar. Here all of the elements of the transaction to be regulated took place within the jurisdiction of the Board. The creamery company is not on the reservation, the milk it not bottled on the reservation and the milk is not handled on the reservation.

It cannot be successfully contended that the creamery company here is exempt from payment of a license merely because it deals with a federal agency. **Trinity Farm Construction Company v. Grosjean,** 291 U. S. 466, 178 L. Ed. 918. Cf. **Patterson Milk and Cream Company v. Milk Control Board,** 192 Alt. 838, 118 N. J. L. 383. The milk in question is only the basis for the computation of the license. If the work is performed on federal property, then the state is without authority to license same. On the other hand, if the work is being done on federal property and as an incident thereto, the person or corporation goes onto state lands, then the person or corporation is then subject to state licenses. **Ralph Sollit and Sons Construction Co. v. Commonwealth of Virginia,** 172 S. E. 290, application denied, 78 L. Ed. 1463, 91 A.L.R. 774; **Ohio River Contract Company v. Gordon,** 224 U. S. 68, 61 L. Ed. 990, 37 Sup. Ct. 5994; **Alward v. Johnson,** 282 U. S. 509, 75 L. Ed. 496.

This leaves for discussion the second aspect of this question, i. e., whether or not the use of the milk in calculating the license to be paid imposes an unconstitutional burden on the Federal Government.

We may assume for the purpose of discussing this aspect that the company here sells only to the Federal Government or its agency.

The creamery company can be required to secure a privilege license. **Trinity Farm Construction Company v. Grosjean,** supra; **Ralph Sollitt and Sons Construction Co. v. Commonwealth of Virginia,** supra. However, does the fact that this privilege license is computed on the number of gallons of milk sold to the Federal Government per day (under our assumption) create an unwarranted burden on the Federal Government.

The general rule in this regard is discussed at length in **Metcalf and Eddy v. Mitchell,** 269 U. S. 514.

Generally speaking, the Court said:

> "* * * * It is apparent that not every person who uses his property or derives a profit in his dealing with the Government may clothe himself

with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule (citing numerous cases)."

Now it is evident that the use of this milk in computing the license will in some way affect the Federal Government. This would be true of any mode of licensing or taxation. The Supreme Court realized this in the Metcalf case and stated:

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other."

The mere fact that the operation of the statute is to effect in some way the federal government does not invalidate the statute. Our courts follow this rule, which is concisely stated in the Metcalf case as follows:

"* * * * Here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. Railroad Co. v. Peniston; Gromer v. Standard Dredging Co.; Baltimore Shipbuilding Co. v. Baltimore; Fidelity & Deposit Co. v. Pennsylvania; Choctaw, O. & G. R. R. Co. v. Mackey, supra."

Neither can it be said that the use of the milk gallonage in computing the license affects in any material way any function of the federal government.

In the Sollitt case, supra, the license tax imposed was based on the gross amount of contracts handled by the contractor. In that case, the court only dealt with the physical jurisdiction and did not concern itself with the question of the burden imposed by this method of computation of license. I think, however, in this case that the silence of the Court on this subject is indicative of its approval of this method of computing licenses.

The case of Alward v. Johnson, supra, is additional authority. There the license considered was based upon the gross receipts derived from the business, the major part of which was carrying the mails. In holding this method of taxation valid, the Supreme Court said:

"Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of

mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the federal government only remotely."

In **Helvering v. Claiborne-Annapolis Ferry Company,** 92 Fed. (2) 875, an analogous situation was presented. A ferry boat company was paid a stipulated sum by the state to operate the ferry. In computing the Federal income tax levied on the net income, the amount paid by the state was claimed not taxable or rather, the said amount should not be used in computing the Federal tax. The court held that the money paid by the state rightfully should have been used in computing the Federal tax, basing its opinion primarily on the Metcalf case discussed above.

Where no distinct burden is laid on the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government, the tax is not invalid. **Wilcuts v. Burns,** 57 Sup. Ct. 125, and numerous cases cited therein.

Therefore, it is my opinion that the use of the milk gallonage in computing the license to be paid by the creamery is not an unwarranted burden on the federal government. I base this conclusion on the cases cited above and on the case of **James v. Dravo Contracting Company,** 58 Supt. Ct. 208, 114 A. L. R. 318, which is peculiarly applicable to this situation. In that case, a contractor working on a project for the federal government in the State of West Virginia was required to pay an occupational tax based on the gross income for the year. The gross income in the State of West Virginia of that contracting company was solely from work done for the federal government. The Supreme Court, in holding that the license was not an unwarranted burden on the federal government, stated:

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did not include 'compensation and liability insurance, construction bond and property taxes.'

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel to operate it. In Trinity Farm Constr. Co. v. Grosjean, 291 U. S. 466, 78 L. ed 918, 54 S. Ct.

469, the taxpayer entered into a contract with the Federal government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the Federal government at all, it as most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax on the gross receipts of the contractor in the Alward Case, 282 U. S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A.L.R. 9, supra, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

Research has revealed one case which at first glance would seem to be contrary to this holding; that case is **Panhandle Oil Co. v. Mississippi,** 277 U. S. 218. However, this case is distinguished on the ground that the Court held the tax there levied to be invalid because it was a tax on the sale made to the federal government and therefore constituted an unwarranted burden. This case is distinguished on this ground in the Dravo case, supra, where the Court said:

"In Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583, supra, and Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. ed. 1277, 51 S. Ct. 601, supra, the taxes were held to be invalid as laid on the sales to the respective governments, the one being a state tax on a sale to the United States, and the other a Federal tax on the sale to a municipal corporation of Massachusetts. A similar result was reached in Graves v. Texas Co. 298 U. S. 393, 80 L. ed. 1236, 56 S. Ct. 818, supra. These cases have been distinguished and must be deemed to be limited to their particular facts. Thus, in **Wheeler Lumber Bridge & Supply Co. v. United States,** 281 U. S. 572, 579, 74 L. ed. 1047, 1051, 50 S. Ct. 419, the Federal tax on transportation as applied to lumber which the vendor had engaged to sell to a county for public bridges and to deliver f.o.b. at the place of destination at a stated price, was held to be laid not on the sale but on the transportation. Although the transportation was with a view to a definite sale, it was held to be not part of the sale but preliminary to it and 'wholly the vendor's affair.' In Liggett & M. Tobacco Co. v. United States, 299 U. S. 383, 81 L. ed. 294, 57 S. Ct. 239, the Federal tax as applied to tobacco purchased by a State for use in a state hospital was sustained as a tax upon the manufacture of the tobacco and not upon the sale. Hence, the Court said, 'the effect upon the purchase was indirect and imposed no prohibited burden.'"

Since the creamery company must be licensed and since the use of the milk gallonage furnished to a federal agency in computing such a license does not constitute an unwarranted burden on the federal government, all of the milk handled by the creamery company must be considered in computing its license.

The destination of the milk distributed by the creamery company is not a consideration. The only elements to be considered by the Board are the

location of the plant and the number of gallons of milk per day handled by same.

The creamery company is not located on Fort McClellan; the milk is not handled on Fort McClellan; the milk is received, bottled and sent out of the plant, all within the jurisdiction of the Milk Control Board; nor does the use of this milk in computing the license place an unwarranted burden on the federal government.

The premises considered, I am of the opinion that all milk handled by a distributor must be computed in calculating the license to be paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1941.

Hon. J. W. Stacks, Clerk,
Circuit Court, Tallapoosa County,
Dadeville, Alabama.

Interest on costs—

Costs which have accumulated incident to the obtaining of a judgment do not bear interest.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of March 13, 1941, in which you request an official opinion, is as follows:

"Please give me your opinion on the following:

"A judgment is secured in the Circuit Court of Tallapoosa County, Alabama in 1932. A certificate of judgment is recorded. An execution is issued against the defendant for the judgment together with the cost. This execution was returned 'No property found'. The plaintiff in turn paid the cost of the case. Again in 1941 the clerk of the Circuit Court issues another execution against the defendant for the judgment with interest thereon together with cost. Was it the Clerk's duty to figure interest on the cost which had already been paid by the plaintiff?

"Is the Circuit Clerk supposed to collect interest on the court cost incident to the judgment if the cost has not been paid?"

A judgment or decree for the payment of money does not carry interest on costs incident to the suit. I call your attention to Section 8565, Code of Alabama, 1928 (Michie), which is as follows:

"Section 8565. Interest on judgments.—Judgments and decrees for the payment of money, other than costs, bear interest from the day of rendition."

This would apply with equal force to the costs paid by the plaintiff after execution was returned "No property found" against the defendant. See 8 Enc. Dig., page 898.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 31, 1941.

Hon. L. L. Armstrong,
Sheriff, Washington County,
Chatom, Alabama.

Seizure fees—Sheriffs—

Where defendant has been convicted of transporting more than five gallons of prohibited liquors and execution has been issued against him for the costs and returned "no property found," the seizure fee may be paid from the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of March 14, 1941, in which you request an official opinion, is as follows:

"Sometime ago I arrested a defendant for transporting twenty five gallons of whiskey, without a search warrant. Said defendant pleaded guilty, and was sentenced to the penitentiary, under the felony statute for transporting over five gallons of whiskey.

"Under Code Section 4654, I would be entitled to a seizure fee of $10.00, as I understand the law.

"Please advise me at your very earliest convenience from what source this amount should be paid, that is from County Fine & Forfeiture Funds or from the State Department of Corrections and Institutions."

It is my opinion that the seizure fee cannot be paid out of what is commonly designated as the Convict Fund, under Section 3667, Code of Alabama, 1923, which section designates the costs which are paid by the State when a convict is delivered to it. This section does not include a seizure fee. Biennial Report of Attorney General, 1930-32, page 558. The case in question being a felony, it is my opinion that it may be paid out of the fine and forfeiture fund of the county, under Section 4039, Code of Alabama, 1923, as amended by Act No. 53, S. 68 approved February 18, 1927 General Acts, 1927, page 45. This section requires the payment of costs in criminal cases out of this fund and says in part, "or in which the defendant has been convicted, and has been proven insolvent by the return of execution 'no property found.'" So if you have a valid judgment for costs on which execution has been returned "no property found," then the seizure fee could be paid out of this fund. Quarterly Report of Attorney General, Volume VIII, page 260; Quarterly Report of Attorney General, Volume II, page 118.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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